In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

70-92

No. ~~1419~~

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners,*

vs.

TRUCKING UNLIMITED, et al., *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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OPINIONS BELOW

Respondents accept petitioners' statement.

JURISDICTION

The district court had jurisdiction under 15 U.S.C. §§15 and 26. The jurisdiction of this court has been

invoked by petitioners under 28 U.S.C. §1254(1). An extension of time for filing this Brief in Opposition to and including May 1, 1971, was granted by the Court.

STATUTES INVOLVED

The following materials are involved in addition to those set forth in the Appendix D to the Petition: (1) the Interstate Commerce Act, (2) the Urgent Deficiencies Act, (3) the California Public Utilities Code, and (4) the Administrative Procedures Act. The relevant additional provisions, together with further portions of the rules of the Interstate Commerce Commission and the California Public Utilities Commission, are set forth in Appendix B hereto.

QUESTIONS PRESENTED

1. Is the concerted use of judicial and administrative adjudicative processes, as the method of implemeeting a scheme to restrain trade, as alleged in the First Amended Complaint, exempted from the Sherman Act by the *Noerr-Pennington* doctrine as a matter of law on a motion under FRCP, Rule 12(b)(6)?

2. Assuming the *Noerr-Pennington* rule extends to the use of judicial and administrative adjudicative processes in a scheme to restrain trade, is relief under the Sherman Act barred as a matter of law on a motion under FRCP, Rule 12(b)(6) where the real purpose and actual effect of defendants' joint activ-

ities was to restrain competitors directly by deterring the filing and prosecution of applications rather than to restrain competition indirectly through bona fide efforts to induce restrictive governmental action?

STATEMENT OF THE CASE

This matter is before the Court because the district court granted petitioners' 12(b)(6) FRCP motion to dismiss for failure to state a claim upon which relief could be granted. In the district court petitioners also filed a motion to dismiss asserting lack of jurisdiction and also claimed primacy or exclusivity of jurisdiction in the ICC and PUC. This motion was not argued or considered by Federal District Judge Sweigert as shown by his letter of October 25, 1967 (Appendix A). Therefore, all questions of exclusive jurisdiction, primary jurisdiction, exhaustion of administrative remedies, express exemption or implied immunity from antitrust laws have not been argued, briefed, or decided and are not now before this Court. It would seem that Circuit Judge Hamlin's dissenting opinion, as well as some of petitioners' points, is based in part upon such issues.[1] The sole question considered and

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[1]The Petition (pp. 7-8) attempts to bring into issue or into evidence matters outside the pleading and outside the scope of the 12(b)(6) FRCP motion to dismiss. Whether the agencies or courts were prevented from exercising control over petitioners is not the question here in issue. The only question before the court is the reach of the *Noerr-Pennington* doctrine to the activities set forth in the complaint and not whether the involved forums, having some potential to control, had exclusive jurisdiction, thus ex-

ruled upon by the two courts below is whether the *Noerr-Pennington* doctrine precludes the operation of the antitrust laws under facts alleged in the First Amended Complaint.

The complaint alleges that petitioners, 19 large highway carriers, and respondents, 15 highway carriers, were engaged in the business of transporting goods throughout California and the West. For some period of time prior to 1962, the California PUC had a liberal policy toward the granting of certificates and their transfer. It is alleged that petitioners, in order to combat the competitive effects of this policy, entered into an agreement in February 1961, to protest

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cluding Sherman Act operation. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966).

A host of other cases decided by the Court are clear in their holding that no industry, regardless of regulation, enjoys a blanket exemption from the antitrust laws. *U.S. v. Philadelphia National Bank*, 371 U.S. 296 (1963); *U.S. v. Pacific & A.R. & N. Co.*, 228 U.S. 87 (1913); *U.S. v. Radio Corporation of America*, 358 U.S. 344 (1959); *U.S. v. Borden Co.*, 308 U.S. 188 (1939); *U.S. v. Federal Power Commission*, 369 U.S. 482 (1959).

Petitioners' lawful standing to appear in such proceedings is not authorization to violate the antitrust laws nor does such standing exempt or immunize them from those laws. Furthermore, respondents are not required by the regulatory statutes involved or by the requirements of the Sherman Act to seek whatever relief might be available through agencies before filing a treble damage action. *Carnation Co. v. Pacific Westbound Conference, supra*, at 222. Nor do the restrictions of the Sherman Act to a common carrier depend upon whether false information is given. Sherman Act violations based upon concerted employment of adjudicatory processes or the "sham" exception to the *Noerr-Pennington* doctrine do not require false information as a predicate for liability. Lastly, whether the First Amended Complaint alleged that a feature of petitioners' agreement was that the alliance would be used against its own members should any one of them file an application is not relevant here. This evidence, alluded to in Footnote 6 of the Petition, has no significance to the charge of whether a conspiracy under the Sherman Act existed or whether the *Noerr-Pennington* rule protects the conspiracy alleged.

all applications then on file with the PUC and ICC, and to protest *all* subsequently filed applications. The practice persisted to the date of the filing of the complaint. Protests, if unsuccessful in causing a withdrawal or settlement, would be pursued to the last forum available. The act of filing protests included demands for hearings, thus necessitating the adversary proceedings under the applicable laws and rules. It was agreed that the financing of the described program should be achieved by a monthly contribution by all petitioners, regardless of the area of operation. The prime purpose of the conspiracy was to discourage and preclude the filing of applications or, once applications had been filed, to discourage and preclude their prosecution. As a necessary part of the plan and in order to give it validity, petitioners agreed to make concerted and competent efforts to prevail at each level. As a most important feature of the plan, petitioners agreed to and did in fact publicize, not to the public, shippers, the PUC, ICC or courts, but to other carriers, the fact of the formation and existence of the combination, the identity of the members, that the agreed contributors would finance protests against all existing and all future applications, regardless of merits, that should petitioners not prevail, all applicants, as a matter of certainty, would encounter all procedural rehearing and appeal devices legally available, and that expense and delay would result even if any applications were finally granted. Petitioners demonstrated to the industry that they were serious about their plan because they vigorously made good on it.

The complaint alleges that the plan was successful not because of any change of the liberal policy of the California PUC, because that policy did not change, but because of settlements or voluntary dismissals of filed applications or abstentions from filing at all due to petitioners' implemented plan. By thus employing adjudicatory processes of agencies and courts, defendants became the regulators, effectively foreclosed access and information to the PUC, ICC and courts. The successful achievement of petitioners' goals was reached not by action of the PUC, ICC or courts but by the success of the plan to deter and preclude filings and prosecution of applications. The holding of the Court of Appeals does not operate to deny lawful and constitutional access to any petitioner or combination of them to the adjudicatory functions of agencies or courts.

ARGUMENT

A. REASONS FOR DENYING WRIT.

Petitioners attempt to interest the court on four grounds, none of which, after analysis, is supportable, particularly at this stage of the proceedings. The Court should deny the writ because the Court of Appeals' decision is entirely consistent with *Noerr-Pennington,* there is no conflict among the circuits, there is no constitutional question either raised or invoked except as referred to in *Noerr* and, even assuming 300 expressions of interest in the decision, such interest by unidentified persons accompanied by an undisclosed number of trade associations contacted by petitioners who showed interest are not grounds for granting the writ. There is no showing that there

is any other group in existence formed for the purpose of and using the means alleged in the First Amended Complaint to restrain trade.

B. THE NINTH CIRCUIT DECISION IS ENTIRELY CONSISTENT WITH NOERR-PENNINGTON

1. Petitioners' activities alleged were not political in nature but were an unlawful conspiracy to restrain trade through employment of adjudicatory processes of agencies and courts. (Meeting petitioners' arguments A-1, A-2 and A-3, Petition, pp. 9-18.)

Eastern Railroads Presidents Conference v. Noerr, 365 U.S. 127 (1961) dealt only with lobbying approaches to the legislative and executive branches of government. *United Mine Workers v. Pennington,* 381 U.S. 657 (1965) dealt only with lobbying approaches to the Secretary of Labor and the T.V.A. purchasing agents. The court characterized these approaches as political activities. Petitioners have taken words used in *Noerr,* such as "political activity", "government", and "public officials" and, without any convincing arguments, urge that the *Noerr-Pennington* doctrine is applicable because the forums alleged to be employed in this case are part of government, that hearing officers, commissioners and judges are public officials, and that any contact with such governmental officials is necessarily political activity. Such a simplistic approach cannot convert behavior before adjudicatory bodies to true political activities as described in both *Noerr* and *Pennington.* Petitioners argue that because their activities employed the machinery of government, it necessarily follows

that such activities must be political. Following their fallacious premise, petitioners conclude that because such activities are allegedly political, they cannot be business activities and, thus, they are out of the reach of the Sherman Act.

In *Noerr,* on no less than eight occasions, the court made crystal clear the activities which it intended to protect.[2] It clearly articulated the basis for the "essential dissimilarity" as being the necessity in a representative government that people have the unfettered right to freely inform public officials. This right is not even brought into issue by the Court of Appeals opinion which is correctly based solely on the First Amended Complaint.

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[2]1. "We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon the *mere attempts to influence the passage or enforcement of laws.*" (365 U.S. at 135) (All emphasis added in this footnote.)

2. "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to *persuade the legislature or the executive to take particular action with respect to a law . . . .*" (365 U.S. at 136)

3. "And we do think the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that Sherman Act forbids associations *for the purpose of influencing the passage or enforcement of laws.*" (365 U.S. at 137)

4. "For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads *at least insofar* as those activities comprised mere solicitation of governmental action with respect to the *passage and enforcement of laws.*" (365 U.S. at 139)

5. "The right of the people to inform their representatives in Government of their desires *with respect to the passage or enforcement of laws* cannot properly be made to depend upon their intent in doing so." (365 U.S. at 138)

6. "There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. More-

The governmental processes involved in this case did not involve the passage or enforcement of laws as contemplated by *Noerr*. The government function involved in the instant case was the application of legislatively established standards to individual cases in contested judicial proceedings. *Noerr-Pennington* does not protect cases of abuse or misuse of the judicial or adjudicative processes, whether the processes are those of the agencies or the courts.

The Public Utilities Commission and the Interstate Commerce Commission licensing procedures, as established by the legislatures and commissions, are adjudicative in nature. Because it is not the function of such adjudicative processes to pass or enforce laws which may or may not restrict competition, but only to apply laws and standards established by the legislature or by their own rule making activities, the necessity for unlimited access for any purpose, present in connection with representative branches of government, is not present there. In this case the normal lobbying opportunities were fully open to petitioners. No doubt such activities would have *Noerr-Pennington* protection.

However, petitioners did not choose this method to restrain trade. The Petition characterizes petitioners'

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over, *all of the evidence* in the record, *both oral and documentary*, deals with the railroads' efforts to *influence the passage and enforcement of laws.*" (365 U.S. at 142)

7. "No one denies that the railroads were making a genuine effort *to influence legislation and law enforcement practices.*" (365 U.S. at 144)

8. "That (Sherman) Act was not violated by either the railroads or the truckers in their respective campaigns *to influence legislation and law enforcement.*" (365 U.S. at 145) (Emphasis supplied.)

behavior as simply combining to present "commonly held positions before administrative bodies and courts" (Petition, pp. 10-11). It requires no more than a cursory reading of the complaint to ascertain that such behavior is not alleged nor is it at issue in this case.[3]

Petitioners' argument that litigation is not involved but only legislative acts is totally without merit. The point has been dealt with in the opinion of the Court of Appeals. (Petition, Appendix A, pp. 5-8, fn. 5-8.) The first leg of petitioners' argument that "public convenience and necessity" is a rule making function, essentially legislative is not helpful. Those words express no more than a legislatively derived standard under which carriers receive their licenses to do business. The means chosen by the lawmakers and commissions to apply that standard to individual cases is through adjudicative proceedings, both in the agencies and the courts.[4]

That the ICC and PUC function as courts as well as rule making agencies cannot be doubted. Whether such functions be denominated "quasi-legislative" or "quasi-judicial" is not the point. Such labels are

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[3]It appears that petitioners in seeking to interest this Court are striving to create the impression that joint protests in individual cases by carriers having common interests in such proceedings have been pleaded or somehow are at issue here. The legality of legitimate joint protests in individual cases is simply not in issue here. The complaint here attacks very specifically the program as described.

[4]While it is true, as petitioners point out, that the PUC has the power to issue certificates with or without hearing (Petition, Appendix D, p. 64), Public Utilities Code §1005 makes a hearing mandatory upon timely application of a person entitled to protest.

meaningless. The Supreme Court of California in *Pacific Telephone & Telegraph Co. v. Eshleman,* 166 Cal. 640, 648 (1913) very early in the history of the PUC ruled that the commission exercised "judicial functions" as well as "purely legislative or legislative-administrative functions." The PUC's judicial functions were held to be of a "highly judicial nature" vested in it by the California Constitution. The PUC is empowered by the Constitution to hear and determine causes "in the same manner and to the same extent as a court of record." The Supreme Court of California concluded on this point by saying:

> "It may be said that the final order of the commission in many instances is legislative-administrative in character, but nonetheless the *ordained procedure by which this result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon these controverted matters, are strictly judicial. (Robinson v. Sacramento, 16 Cal. 208; Imperial Water Co. v. Board of Supervisors, 162 Cal. 14 [120 Pac. 780]).*" (Emphasis added.) 166 Cal. at 648.

See Article XII, §§22 and 23 of the California Constitution.

The cases cited by petitioners (Petition, pp. 12-13) do no more than hold that commission determinations are subject to limited rather than a general court review. Respondents do not deny that it is the function of the agencies and courts when employing *ordained* adjudicatory processes to resolve private disputes to carry out legislative standards. Such is the

purpose of the use of the judicial function thus employed. The case at bar deals with petitioners' use of such procedures and not the correctness of the application of the standards. As set forth in *Eshleman,* procedural functions used by the PUC in contested proceedings, though resulting in the issuance of final orders based upon legislative-administrative criteria, are strictly judicial. This ruling has not been overturned and the subject matter is not even dealt with in cases cited by petitioners.[5]

Both the PUC and ICC have established procedures, meeting procedural due process requirements, which provide for a hearing in individual cases upon the filing of a verified application and a demand for a hearing by a protestant. (Cal. Public Utilities Code §1005, Rules of Practice (ICC) Rule 247 (49 C.F.R. §1100.247.) The procedures are judicial in nature. They provide for issuance of process, formal notices, discovery, depositions, subpoenas, testimony under oath, written findings and conclusions, written decisions and use of precedent in the decisional process, a formal record and the impermissibility of a contested case. Both regulatory schemes provide for judicial review under statutory criteria. (See Statutes and Rules set forth in Appendix B and Petition Appendix D, pp. 61-82, inclusive.)

Respondents know of no writers on the subject, including those cited by petitioners (Petition, pp.

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[5]*Southern California Edison Co. v. R. Comm.*, 6 Cal.2d 737 (1936), one of the cases cited by petitioners, holds in clear terms that the commission exercises legislative, executive, administrative and judicial power (pp. 737-738).

12-13) which hold a view that the agencies in question do not engage in judicial activities. Petitioners have cited the 1956 edition of Public Regulatory Law, Vantage Press, 1956, by Judge McKeage. At pages 84 and 85 of his publication, the author refers to the "internal adjudicatory process of an administrative tribunal" as being on a par with that of the average court. He points out that in such function the California PUC is "a court of record" by constitutional fiat. He points out that such administrative bodies have many functions, but among them is the "purely judicial function". Judge Friendly's article entitled "The Federal Administrative Agencies: A Need for Better Definition of Standards", 75 Harv. L. Rev. 863 (1962) also supports respondents' views. He asserts that since from a practical point of view the legislature is incapable of "administrative adjudication", it is improper to call such function a delegation by the legislature (p. 871). He stated:

> "It will scarcely have escaped your attention that the application of standards of greater or less generality to concrete cases is not a function peculiar to administrative agencies; it has long been practiced by other institutions not unknown to law students. Indeed, at one end of the administrative spectrum, *it is hard to discern much difference between either the problem or the decisional processes of the agencies and those of the courts.*" (75 Harv. L. Rev. at 874; emphasis added.)

See also 1 K. Davis, Administrative Law Treatise, §7.02 at p. 413 (1958).

Irrespective of labels, such as "political" or "business" activities, the courts have consistently held that use of adjudicatory machinery, pursuant to a conspiracy to unreasonably restrain trade, will result in a violation of the Sherman Act. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *U. S. v. Singer Manufacturing Co.*, 374 U.S. 174 (1963); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 424-425 (10th Cir. 1952), *cert. den.* 344 U.S. 837; *Lynch v. Magnavox Co.*, 94 F.2d 883 (9th Cir. 1938). The considerations of *Noerr-Pennington* are absent and such procedures may not be corrupted or perverted under the banner of political activity.

Perversion of adjudicatory processes of an agency is no less a violation of law than similar perversion of court functions. This proposition was established in *Singer* where defendants were found to have conspired to bring adversary proceedings before the U.S. Tariff Commission as well as before the courts. See also *Melvin v. Pence*, 130 F.2d 423 (D.C. Cir. 1942) and *National Surety Co. v. Page*, 58 F.2d 145 (4th Cir. 1932). *NAACP v. Button*, 371 U.S. 415 (1963) is of no help to petitioners since the basis of that decision was the otherwise lawful and ethical aim of the NAACP, thus making use of courts appropriate.[6]

[6]*Button's* facts are widely different from those alleged. The court there acknowledged that the NAACP had no other forum of government open to it to achieve its admittedly political purposes. No abuses of court functions for an unlawful purpose were present in *Button*. On the contrary, the purpose of litigation there was to redeem constitutional rights, a high and ethical aim.

In the case at hand, petitioners' purposes are assumed on this 12(b)(6) motion to be unreasonably anticompetitive and, but for the protection of *Noerr-Pennington,* are clearly illegal.

Neither the power of the executive and legislative branches nor the rule making powers of agencies to develop standards having anticompetitive effects is endangered by the opinion below. The Court of Appeals held that the function of government employed by petitioners alleged in the First Amended Complaint is not charged with the passing or enforcing of anticompetitive laws. Rather, in those procedural forums, they are charged with applying to individual contested cases then established standards of public convenience and necessity. (Petition, Appendix A, p. 5) The complaint does not allege and petitioners have failed to show that lobbying governmental bodies acting in rule making or law enforcement capacities was foreclosed to their combination, nor that they were precluded from supplying information to them. Nor have petitioners shown that the Ninth Circuit's opinion holding the alleged combination violative will preclude them from properly and lawfully furnishing information to the agencies acting as courts or to courts themselves. It is the conspiracy to pervert the processes of the courts, as alleged, for anticompetitive purposes, which is attacked in the complaint. Petitioners do not address themselves to this issue and thus their petition in very large part has little relationship to the narrowly drawn complaint.

Without conceding the point but assuming, as petitioners do (Petition, p. 14), that carriers are "encouraged" to file protests, it does not follow that the conspiracy here alleged is shielded from the Sherman Act by *Noerr-Pennington*. The invitation to participate in proceedings and the providing of machinery to do so is not a license to violate the law. Here, as elsewhere in petitioners' arguments, the points made ignore the First Amended Complaint and speak only of carriers' legitimate rights to protest in adjudicating forums. Petitioners should not be granted a review under *Noerr-Pennington* standards based on facts found only in their brief rather than those in the basic pleading.

Taken as a whole, petitioners' position is simply that their right to use court and judicial functions of agencies for any purpose is unlimited because of the First Amendment protection. Such a contention is utterly without merit. This branch of their argument contends that they have been denied lawful and constitutional access to government by the Ninth Circuit's opinion. Petitioners' claim must be taken to mean that the First Amendment of the United States Constitution guarantees to them not only the right to lobby the legislative and executive, but guarantees them a totally unrestricted right to use judicial processes for the purposes alleged in the First Amended Complaint.

NAACP v. Button, supra, at 440-441, a case relied upon by petitioners, held that litigation as a means of vindicating constitutional rights could not, *as a*

matter of law, be held to be malicious misuse of courts. The Court, continuing in *Button,* acknowledged that participation in "misuses of the legal process is conduct traditionally condemned as injurious to the public." It follows that petitioners may not balloon the lawful right to protest into a constitutionally protected license to use the processes of courts and adjudicatory bodies for the purpose and in the manner alleged. In *Button* the purpose was lawful and hence protected.[7] In *Noerr* the purpose, otherwise unlawful, was protected from the Sherman Act because the Sherman Act does not reach constitutionally protected political activities. In the case at bar, the unlawful purpose implemented by use of adjudicatory machinery is not protected by *Noerr* or the First Amendment.

The activities alleged are within the reach of the Sherman Act because they are abusive of processes of government, they are not political expressions, and the First Amendment does serve to immunize them. *Eastern Railroads Presidents Conference v. Noerr, supra; U.S. v. Singer Manufacturing Co., supra; NAACP v. Button, supra.*

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[7]In *Button,* Mr. Justice Harlan dissenting, acknowledged the laudable aims of the NAACP litigation but dissented on the ground that those aims may have been achieved by other means within the framework of existing state law. It is clear in the case at bar that other lawful methods were available to petitioners than the alleged plan. The Supreme Court has held recently on two occasions that courts are a proper forum for group activity where the aims of the group are lawful. *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar,* 377 U.S. 1 (1964) and *United Mine Workers v. Illinois State Bar Ass'n,* 389 U.S. 217 (1967).

Access to any branch of government is not unlimited. Even where lobbying is appropriate, registration of lobbyists is required and bribery is prohibited. In the recent case of *Woods Exploration & Prod. Co., Inc. v. Aluminum Co. of America,* 1971 CCH Trade Cases ¶73,422 (5th Cir. 1971), the court held that misrepresentations made to a rule making body were not *Noerr* protected because the "policies of the Sherman Act should not be sacrificed simply because defendants employ governmental processes to accomplish anticompetitive purposes." (p. 89,723) Access to adjudicating bodies is far more limited than to executive, legislative, and rule making bodies. Lobbying or extrajudicial attempts to influence the result of contested proceedings is prohibited. General Rules of Practice (ICC), Appendix A and Appendix C (49 C.F.R., Appendix A and Appendix C.) The mode of expression in forums employing adjudicatory processes is different from those found in other forums of government. The means of supplying information in judicial bodies is governed by formal rules with notice playing an important roll.

The processes of such forums may not be deliberately activated or interfered with in order to achieve an anticompetitive result. They may not be used to vent one's malice upon another. Thus, the intent and purpose of a party in using legal processes may be ascertained in order to determine if they have been misused for an unlawful purpose. Indeed, respondents know of no case which has held that judicial processes may be lawfully used to accomplish an unlawful

objective—whether the objective is wrapped up in political considerations or not. *NAACP v. Button, supra,* at 440-441. In *Button* the Court significantly pointed out behavior which would not be tolerated because it was a "different matter" than seeking to vindicate constitutional rights:

> "Resort to the courts to seek vindication of constitutional rights is a *different matter* from the oppressive, malicious, or avaricious use of the legal process for purely private gain." (371 U.S. at 443)

No matter how vociferously petitioners may argue the legitimacy of their activities in using the relevant forums, the First Amended Complaint charges them with oppressive, malicious and avaricious use of legal processes for purely private gain. This activity is, we submit, a "different matter" and "essentially dissimilar" from any protected activities found either in *Button* or *Noerr.*

Petitioners make no attempt to distinguish *Singer* and other similar cases, except to point out that *Noerr* was not mentioned in the *Singer* opinion. (Petition, p. 10) The reason for this omission is clear. *Noerr* was inapposite. The activities in *Singer* were nonpolitical in the *Noerr* sense, they were unlawful in purpose and they employed adjudicating machinery as a means. If petitioners are asserting that their participation in contested proceedings involving public convenience and necessity are political expressions and that patent litigation is not, then they are plainly wrong. The Constitution, laws and court decisions

have identified the patent area as one based upon a strong public policy and the patent office and the courts have exercised broad discretion within that area. The same is true of certificates of public convenience and necessity. The same may be said of antitrust policy. All are stamped with historic and broad public policy considerations. These factors, however, do not change the essential fact that in the context of adjudication of individual rights under such standards, they involve private disputes in judicial forums. Mere involvement of public policy considerations or discretion in the application of standards does not render participation in such disputes political expression.

A program to harass competition by filing consistent antitrust actions, patent infringement actions or protests in certificate proceedings, as alleged, is unlawful in purpose and is not protected by the Constitution, *Noerr* or *Button*.

2. Assuming the Noerr-Pennington rule applies to the concerted use of adjudicatory processes for the purpose of unreasonably restraining trade, petitioners' activities were not genuine efforts to influence government to restrain trade but were efforts to directly restrain the trade of competitors. (Meeting petitioners' argument A-4, pp. 18-28.)

Even if the court should find the *Noerr-Pennington* rule applicable to anticompetitive use of the adjudicatory functions here involved, the exception to that rule that activity ostensibly directed at influencing government action which, in substance, operates as a direct restraint upon competition is not protected, is applicable in this case. Respondents, under the pleadings

in this case, are clearly entitled to a trial on the "sham" issue. Evidence of the nature and purpose of the plan, correspondence and conversations should be considered by a trier of fact to determine if petitioners' aim was to make access to the agencies difficult or impossible or whether the method decided upon to restrain trade was to induce government to act or refrain from acting. If the "sham" exception exists, as we submit it does, then the case should not have been dismissed without a trial.

Petitioners' concept of the "sham" rule is contrived and incorrect. They quote *Noerr* out of context and contrary to its clear meaning. We agree with petitioners up to this point, that if *Noerr* applies, anti-competitive intent is irrelevant. But we disagree with petitioners if they intend to call upon *Noerr's* protection for activities other than those which are "*genuine efforts* to influence" government to act or not act. The requirements of *Noerr* are simple. The anti-competitive aims must be sought to be achieved through genuine efforts to induce government to act in such a manner that it, not the petitioners, will restrain the trade of competitors. *Noerr* cannot apply unless that genuine effort is present.

There can be no doubt, as the Court found in both *Noerr* and *Pennington,* that the defendants there truly and ruthlessly sought to have the restraint achieved through government action. Their efforts, whether successful or not, were protected. Furthermore, resulting government actions were protected under the rule of *Parker v. Brown,* 317 U.S. 341 (1943).

Respondents' pleading here alleges that the petitioners' real purpose was to block accesses to agencies and to discourage the filing and prosecution of applications. The medium of government action was employed by petitioners, mainly to demonstrate to potential applicants that they were prepared to do and would do exactly what they publicly threatened. Thus, when petitioners appeared in protest, they vigorously asserted their opposition. However, the basic purpose, as alleged, underlies their entire scheme. The First Amended Complaint does not allege petitioners' success as resulting from actions of the agencies or courts. On the contrary, success was derived by reductions in the number of applications filed and increases in settlements and abandonments. Such reductions and increases did not result from agency or court rulings, for indeed the liberal policy remained, but because of the advertised burdens which necessarily had to be faced as a result of petitioners' declared and implemented purposes.

Favorable rulings were at times indeed received by petitioners' group, but such rulings were incidental to the principal purpose. *Noerr* itself recognized that incidental unlawful effects of a plan of political action would not preclude the application of the principle of that case. It follows that the obtaining of favorable rulings where an applicant did not abandon or settle, were inherent in the execution of the plan. However, they were incidental to it and should not serve to preclude the operation of the Sherman Act if the allegations of the First Amended

Complaint are proved at trial. *Eastern Railroads Presidents Conference v. Noerr, supra,* at 143-144, Petition, Appendix A, pp. 13-14.

The types of direct behavior which might constitute sham activities are as endless as the ability of businessmen to develop new and different methods to restrain competitors. The Sherman Act is one of general application and must be accorded flexibility, otherwise it would most certainly be circumvented. *Northern Pacific Ry. Co. v. U. S.,* 356 U.S. 1, 4 (1958); *U. S. v. American Tobacco Co.,* 328 U.S. 781, 809 (1946). The rule announced by *Noerr* dealing with sham activity is surely not limited to behavior which interferes directly with the "business relationships" of competitors or to the persuasion of customers "not to deal with truckers". Still petitioners argue that language in *Noerr* leads to the conclusion that only those limited classes of activities among all other possible types of activities by which the affairs of a competitor might be unlawfully interfered with may be characterized as "sham". Respondents submit that the Court in *Noerr* meant no such limitation on the sham exception. Customer relations were discussed there because the third party technique under discussion might well have been directed at customers. In the case at hand, petitioners were not attempting to interpose themselves directly between competitors or competitors' customers but, through concerted behavior, between competitors and lawful access to the agencies, the only source of competitors' business rights.

A recent Court of Appeals decision held *Noerr* inapplicable though it is clear from the facts that defendants did not interfere with business relationships of competitors or relationships with their competitors' customers. In *Woods Exploration and Prod. Co., Inc. v. Aluminum Co. of America, supra,* the court held that false information intended to influence the actions of the Texas Railroad Commission was not protected by *Noerr* (pp. 89,723-89,725). The Fifth Circuit found that defendants' conduct was "not designed to influence policy". Rather it held:

> "In light of this determination we hold that the *abuse* of the administrative process here alleged does not justify antitrust immunity. Consequently, we reverse the grant of summary judgment and remand the issue for an evidentiary determination of whether or not defendants in fact filed false nominations, and, if so, what damages plaintiffs sustained therefrom." (p. 89,725)

In connection with "sham", as before, petitioners have avoided dealing with the First Amended Complaint. Rather petitioners make an irrelevant and emotional plea that the Court of Appeals opinion in the instant case will prevent joint appearances before administrative and judicial bodies where the purpose is to influence policy. This case has not and cannot result in such a holding if respondents try to win the case on their First Amended Complaint. A trier of fact could conclude, if evidence proves the allegations, that petitioners had the specific purpose of deterring filings and making difficult free access by

the announcement and earnest carrying out of the plan. It will be argued at trial that petitioners could not have intended to achieve their restraint through government action because such an aim is totally inconsistent with the unique feature of the plan that there be a publicity campaign intended to convey in unmistakable terms to all competitors the prohibitive expenses of making applications. The publicity campaign was particularly devastating. It brought the filing of applications for rights, transfers and registrations from a high level to a virtual standstill. This happened despite the encouragement to file applications because of the liberal policy. In short, petitioners' activities demonstrated that their conspiracy was designed to prevent appellants from obtaining business rights not by defeating competitors on the merits before the commissions, but by directly deterring them from seeking such rights.

The Ninth Circuit's decision does nothing more than rule respondents are entitled to a trial on the "sham" issue. Petitioners' position amounts to nothing more than a plea that there really is no exception to *Noerr* so long as government processes are in any manner involved. *Noerr* renders no such protection. A conspiracy which has as its deliberate purpose the abridgment of open access to public bodies by others rather than a genuine effort to influence government cannot be immunized by the *Noerr-Pennington* doctrine.

C. THERE IS NO CONFLICT WITH THE DECISIONS OF ANY OTHER CIRCUIT. (MEETING PETITIONERS' ARGUMENT B, pp. 22-24.)

Petitioners cite *Associations of Western Railways v. Riss & Co.*, 299 F.2d 133 (D.C. Cir. 1962) as a circuit court opinion in conflict with the Ninth Circuit's. This position is no more or less than petitioners' prior argument that the Ninth Circuit opinion conflicts with *Noerr*. A reading of *Riss* showed that it is a carbon copy of *Noerr*. Many of the defendants in *Riss* were defendants in *Noerr*. The district court opinion[8] reveals that defendants directly or through public relation experts "persuade[d]" the Ohio PUC to file proceedings before the ICC (170 F.Supp. at 357); state, city and town officials were "urged" to enact statutes, ordinances and regulations designed to restrain Riss (170 F.Supp. at 357); and directly or through front organizations "urged" state officials to carry out a program of strict enforcement of existing laws and to investigate Riss (170 F.Supp. at 358). Finally, defendants "persuade[d]" citizen groups to register complaints against Riss before the ICC in rights proceedings. (170 F.Supp. at 358.) Petitioners have fixed upon the last allegation to establish their alleged conflict of decisions argument. The last point is not discussed either in the district court or court of appeals opinion. However, even assuming, as petitioners do, that it involved "evidently the presentation of evidence adverse to Riss in formal proceedings for certificates of public convenience and necessity"

[8] *Riss & Co. v. Association of American Railroads*, 170 F.Supp. 354 (D.C. D.C. 1959).

(Petition, p. 23), such activity does not create a conflict either with the decision in this case or with *Noerr*.

It is clear as to all of the alleged activities of defendants in *Riss* that the sole purpose of the conspiracy was a genuine attempt to have government act to restrain Riss, whether by executive orders, legislative action or rulings of the Commission. Indeed in *Riss*, as in *Noerr*, the anticompetitive impact was to be accomplished solely by government action. This was the reason for the existence of the conspiracy and the actions taken pursuant to it. There is no hint that the plan was one which sought directly to discourage and deter approaches to government by *Riss* by advertised threats of ceaseless protests. Although the words "abused their privilege of intervention" are used by the district court to describe the charges made by plaintiffs in characterizing defendants' acts in persuading citizen groups to intervene (170 F.Supp. at 358), no further elaboration of the point is made anywhere and the significance of the point is lost among those which were genuine lobbying activities. The court of appeals does not touch upon the point. Although it may have been alleged in *Riss* that defendants among other things persuaded citizen groups in one proceeding to abuse intervention privileges, it cannot be said that defendants' plan was one to abuse judicial process. A trial was had and it cannot be ascertained from the two decisions what disposition was made of the "abuse" point. The facts, as they appear from the decisions,

show no more than that the groups appeared and protested in a single proceeding at defendants' urging. The label "abuse", a conclusory allegation, must be taken to mean what follows it by way of description of the acts involved. Those acts were no more than registering of complaints to win a proceeding, not to give credence to a plan which advertised it would continually employ the processes of the agencies to deter future filing.

D. THE FIRST AMENDED COMPLAINT DOES NOT PRESENT ANY UNSETTLED QUESTIONS RELATING TO THE REACH OF THE SHERMAN ACT IN LIGHT OF THE FIRST AMENDMENT. (MEETING PETITIONERS' ARGUMENT C, pp. 24-25.)

This point is dealt with in the main by respondents' arguments that the rule of *Noerr-Pennington* does not apply here because (1) adjudicatory functions are involved and hence different considerations than those present in *Noerr* are applicable and (2) *Noerr* applies only where the actors genuinely attempt to persuade government to carry out their anticompetitive work. The constitutional necessity of freedom to inform government will not be endangered if respondents prove their allegations and receive a judgment.

Representative government must be freely available to all. But access to courts and adjudicatory bodies is limited and constitutionally so by prevention of abuses of its processes. *In Re Stolen*, 196 Wis. 602, 216 N.W. 127, 129 (1926); *Thomas v. Collins*, 323 U.S. 516, 531 (1945). Like the guaranteed right to

free speech, citizens' right to access to adjudicatory processes must be guarded against unseemly efforts to pervert the system from which the right arises. *Pennecamp v. Florida,* 328 U.S. 331, 347 (1946); *Bridges v. California,* 314 U.S. 252, 271 (1941); *Sheppard v. Maxwell,* 384 U.S. 333, 350-351 (1966): Under the allegations here relevant, petitioners combined and by their deliberate acts impinged directly upon competitors purposefully to deny them the access to government bodies which they now claim so vociferously for themselves. They clearly sought to stop the flow of information, claimed to be so important, originating from competing sources by clogging the channels of communicating that inforation. Respondents submit that plans such as petitioners' can and must never be given constitutional or any other protection. The plan under examination here is no more than the bypassing of government for a totally illegitimate purpose and it destroys the effectiveness of the processes and purposes of government.

If the constitutional right to petition is here involved, it does not protect the actor if such rights are abused by him. *Button* and *Noerr* both so hold. In neither of those cases was "abuse" of the processes of government found present. Thus, since the complaint here alleges that petitioners have abused the processes of government and thus have exceeded the allowable limits of constitutional protection, they must accept the consequences applicable to all who are not entitled to such protection. The consequences are that prevailing law controls them.

Petitioners suggest that a doctrine akin to primary jurisdiction be developed to correct abuses of the right to petition rather than permit remedies under existing law. This suggestion is totally without merit. Indeed, if the legislatures had intended such abuses to be handled exclusively in the agencies, they would have so provided. Certainly since the origination of our system of laws, abuses of the right of access to or use of the processes of government have been remedied in courts (e.g., private actions for abuse of process, malicious prosecution, use of patent litigation to restrain trade, etc.). Courts have the inherent power to protect themselves (e.g., contempt) and legislatures have the power to designate or withhold remedies, within constitutional limits, for all such unprotected activities. The legislature has not placed the exclusive remedies for unprotected abuses with the agencies here involved.

By statutory construction, untouched by the legislature, the Court has evolved "jurisdictional" rules for those seeking remedies against regulated violators of the Sherman Act. As stated previously, petitioners have presented both the "primary jurisdiction" and "exhaustion of remedies" defenses in the district court, but such contentions have not been ruled upon. They are not now in issue. Even if they were in issue, it is clear that the agencies involved here cannot award money damages for past acts even though they may have the power to remedy abuses prospectively. Furthermore, competitors, having been injured by an antitrust violation, may chose the forum in

which they seek relief unless exclusive jurisdiction prevents it. Such is not the case here. *Carnation Co. v. Pacific Westbound Conference, supra,* p. 222.

E. THIS CASE IS NOT OF GREAT IMPORTANCE TO A SUBSTANTIAL SEGMENT OF AMERICAN SOCIETY. (MEETING PETITIONERS' ARGUMENT D, p. 26.)

This case's notoriety, whatever its extent, arises only because writers, like petitioners, have not acknowledged the content of the First Amended Complaint. Finding it more palatable to argue from a different base, they have proceeded to call attention to points which are not raised and which are specifically excluded by a narrowly drawn pleading.

There is no showing that any other group similar to petitioners and having its purposes as alleged, exists anywhere in the United States. Respondents certainly know of none and petitioners have failed to mention any. The expression of interest of 300 unidentified persons is meaningless to sustain this ground for review. Petitioners do not describe who they are nor the details of their interest. The result of petitioners' canvas of trade associations does not reveal their number or what their interest may be. Respondents submit that there is no conflict between *Noerr-Pennington* and the instant case. They are widely separated factually and legally and do not create any inconsistency except insofar as petitioners depart from the alleged facts.

CONCLUSION

The only question before the Court is whether the facts alleged fall within the *Noerr-Pennington* construction of the Sherman Act. Primary jurisdiction and other similar problems are not in issue here. Respondents should be allowed to try this case on both the "adjudicatory process" theory and on the "sham" theory; however, proof under either theory is enough to render *Noerr* inapplicable. For reasons stated, the writ of certiorari sought by petitioners should be denied.

Respectfully submitted,

MICHAEL N. KHOURIE,
Counsel for Respondents.

BROAD, KHOURIE & SCHULZ,
MICHAEL N. KHOURIE,
Of Counsel for Respondents.

Dated, April 23, 1971.

(Appendices Follow)

Appendix A

Chambers of
William T. Sweigert
United States District Judge

San Francisco 1, California

October 25, 1967

Mr. Michael N. Khourie
Attorney at Law
Russ Building
235 Montgomery Street
San Francisco, California

Re: Trucking Unlimited, et al. v. California Motor Transport Co., et al., No. 45073

Dear Mr. Khourie:

On October 5, 1967, this Court issued its Memorandum of Decision in Civil No. 45073, dismissing the first amended complaint on the ground that, under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the first amended complaint failed to "state a claim upon which relief can be granted" pursuant to Fed. R. Civ. P. 12(b)(6).

Although that Memorandum deals exclusively with the applicability of the *Noerr* doctrine, it appears that there is some uncertainty with respect to whether the Court passed upon defendants' second motion to "Dismiss First Amended Complaint on Ground of Primary Jurisdiction, or to Stay Pending Administrative Action."

On page 2 of defendants' Memorandum of Points and Authorities in support of their motions, filed April 17, 1967, the defendants requested:

> "That the Motion to Dismiss for Failure to State a Cause of Action be considered First and Separately from the motions based on primary jurisdiction, and that the argument on the latter be withheld until decision on the former, so that if the Court agrees with defendants' position argument on the second motion will become unnecessary."

The Court also notes that defendants' motion to dismiss under the *Noerr* doctrine was the only motion argued during the oral presentation of this matter.

Lest there be any misunderstanding, I think it obvious that the separately made motion to dismiss on ground of primary jurisdiction *or* to stay pending administrative review was *not* considered in the October 6, 1967 Memorandum of Decision.

Sincerely,

/s/ W. T. S.

W. T. Sweigert

cc:

Graham James & Rolph

Heller, Ehrman, White & McAuliffe

John MacDonald Smith, Esq.

W. D. Benson, Jr., Esq.

Filed November 1, 1967,
James P. Welsh, Clerk.

Appendix B

Relevant provisions from the Interstate Commerce Act, Urgent Deficiencies Act, Administrative Procedures Act, General Rules of Practice (I.C.C.), California Constitution, California Public Utilities Code, Rules of Practice and Procedure (California P.U.C.)

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1. INTERSTATE COMMERCE ACT

49 USC § 17. Commission procedure; delegation of duties; rehearings

Conduct of proceedings; seal; oaths; quorum; rules

(3) The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Secretary of the Commission, or any member of a board may administer oaths and affirmations and any member of the Commission or the Secretary of the Commission (or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves) may sign subpoenas. A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commissioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested. All

hearings before the Commission, a division, individual Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest.

Findings, etc., of Commissioner or board; accompanying statement and recommended order; copies to parties; exceptions; recommended order as Commission's order

(5) Any finding, report, or requirement of an individual Commissioner or board, with respect to any matter so assigned or referred involving the taking of testimony at a public hearing, shall be accompanied by a statement in writing of the reasons therefore, together with a recommended order, which shall be filed with the Commission. Copies thereof shall be served upon interested parties (including, in proceedings under Chapter 8 of this title, persons specified in section 305(e) of this title), who may file exceptions thereto, but if within twenty days after service upon such persons, or within such further period as the Commission or a duly designated division thereof may authorize, no exceptions shall have been filed, such recommended order shall become the order of the Commission and become effective unless within such period the order shall have been stayed or postponed by the Commission or by a duly designated division thereof. The Commission, or a duly designated division thereof, upon its own motion may, and where exceptions are filed it shall, reconsider the matter either upon the same record or after further hearing, and such recommended order shall thereupon be stayed or postponed pending final determination thereof.

Rehearing, reargument, or reconsideration of decisions, orders, and requirements

(6) After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5) of this section, any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, re-

argument, or reconsideration of a matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2) of this section, if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5) of this section, and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

Reversal or modification after rehearing, etc.

(7) If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order or requirement made after rehearing, reargument, or reconsideration, reversing, changing or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order.

Stay of decisions, etc., not effective at time of application for rehearing, etc.

(8) Where application for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board

is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision, order or requirement has not yet become effective, the decision, order, or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission.

Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.

(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Reference of administrative matters to examiners

(10) Any matter arising in the administration of chapter 8 of this title as to which a hearing is to be

held may be referred to an examiner of the Commission, for action thereon, subject to the conditions and limitations provided in this section in the case of reference of work, business or functions, as to which a hearing is to be held, to an individual Commissioner or board.

Intervention of representatives of employees

(11) Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees.

Admission to practice before Commission

(12) The Commission is authorized to promulgate reasonable rules and regulations relating to admission to practice before it, and is authorized to impose a reasonable fee for such admission, and such fees shall be covered into the Treasury of the United States as miscellaneous receipts.

49 USC § 305. Administration—Joint boards; composition; references of matters to boards

(a) The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this chapter with respect to such operations as to which a hearing is required or in the judgment

of the Commission is desirable: Applications for certificates, permits or licenses; the suspension, change, or revocation of such certificates, permits, or licenses; applications for the approval and authorization of consolidations, mergers, and acquisitions of control or operating contracts; . . .

Oaths; attendance of witnesses and production of documents

(d) So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpoena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter.

Notice of proceedings and opportunity for hearing

(e) In accordance with rules prescribed by the Commission, reasonable notice shall be afforded, in connection with any proceeding under this chapter, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor carrier operations involved in the proceeding

are or are proposed to be conducted, and opportunity for intervention in any such proceeding for the purpose of making representations to the Commission or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties.

Court review of Commission's orders; compelling Commission to take jurisdiction

(g) Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title: *Provided,* That where the Commission, in respect of any matter arising under this chapter, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of Title 28, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

Application of section 17 of this title

(h) All the provisions of section 17 of this title shall apply to all proceedings under this chapter.

Pecuniary interest in motor carrier under investigation forbidden

(i) No member or examiner of the Commission or member of a joint board shall hold any official relation to, or own any securities of, or be in any manner pecuniarily interested in, any motor carrier or in any carrier by railroad, water, or other form of transportation.

49 USC § 306. Certificate of convenience and necessity—Necessity for; carriers in bona fide operation on June 1, 1935; traffic moving to and from Territories and possessions; "grandfather" provisions

(a) (1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however, . . .*

Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307(a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful.

(6) In accordance with such reasonable rules as may be prescribed by the Commission, any party in interest, who or which opposed in the State commission proceeding the authorization of operations in interstate or foreign commerce, may petition the Commission for reconsideration of the decision of the State commission authorizing operations in interstate or foreign commerce, and upon such reconsideration upon the record made before the State commission, the Commission may affirm, reverse, or modify the decision of the State commission, but only with respect to the authorization of operations in interstate and foreign commerce.

(7) (A) In the case of any person who or which on October 15, 1962, was in operation solely within a single State as a common carrier by motor vehicle in intrastate commerce (excluding persons controlled by, controlling, or under a common control with, a carrier engaged in operations outside such State), and who or which was also lawfully engaged in such operations in interstate or foreign commerce under the certificate exemption provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before October 15, 1962, or who or which would have been so lawfully engaged in such operations but for the pendency of litigation to determine the validity of such person's intrastate operations to the extent such litigation is resolved in favor of such person, and has continued to so operate since October 15, 1962 (or if engaged in furnishing seasonal service only, was lawfully engaged in such operations in the year 1961 during the season ordinarily covered by its operations, and such operations have not been discontinued), except in either instance as to interruptions of service over which such person had no control, the Commission shall issue to such person a certificate of registration authorizing the continuance of such transportation in interstate and foreign commerce if application and proof of operations are submitted as provided in this subsection. . . Certificates of registration shall be valid only so long as the holder is a carrier engaged in operation solely within a single State, not controlled by, controlling, or under a common control with a carrier engaged in operation outside such State, and except as provided in section 5 of this title and in the conditions and limitations stated

herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Commission, but may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the intrastate certificate without the interstate or foreign rights shall terminate the right to engage in interstate or foreign commerce.

Application for certificate; form and contents

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of subsection (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle on October 1, 1935 may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

49 USC § 307. Issuance of certificate—Issuance authorized to qualified applicants for regular routes and between fixed termini

Certificate not to confer proprietary or property rights in highway

(b) No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways.

49 USC § 309. Contract carriers by motor vehicle

(a) (1) Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided, . . .*

Otherwise the application for such permit shall be decided in accordance with the procedure provided for in subsection (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful.

49 USC § 312. Suspension, change, revocation and transfer of certificates, permits, and licenses

(b) Except as provided in section 5 of this title, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

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2. URGENT DEFICIENCIES ACT

28 USC § 2321. Procedure generally; process

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

28 USC § 2322. United States as party

All actions specified in section 2321 of this title shall be brought by or against the United States.

28 USC § 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection

of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 USC § 2324. Stay of Commission's order

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

28 USC § 2325. Injunction; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

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3. ADMINISTRATIVE PROCEDURES ACT

5 USC § 551. Definitions

For the purpose of this subchapter—

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

5 USC § 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before board or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial

manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for

the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 USC § 702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 USC § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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4. INTERSTATE COMMERCE COMMISSIONS GENERAL RULES OF PRACTICE (49 CFR § 1100)

Rule 4. Communications and pleadings generally—

(e) Ex parte communications prohibited; penalties provided. Ex parte communications as defined in Appendix C to this part are prohibited and any person violating the prohibitions set out in such Appendix is subject to the penalties as therein provided.

Rule 19. Pleadings part of record. Recitals of material and relevant facts in a pleading filed prior to oral hearing in any proceeding, unless specifically denied in a counterpleading filed under these rules, shall constitute evidence and be a part of the record without special admission or incorporation therein, but if request is seasonably made, a competent witness must be made available for cross-examination on the evidence so included in the record. Pleadings may contain specific references to or quotation from the tariffs or schedules containing the several rates, fares, charges, schedules, classifications, regulations or practices alleged to be material. A filing under Rule 42 *Petitions for suspension of tariffs or schedules,* shall not be considered a pleading for purposes of this rule.

Rule 38. Applications—(a) Forms and instructions. An application filed with the Commission shall be

prepared in accord with and contain the information called for in the form of application, if any, described by the Commission, or any instructions which may have been issued by the Commission with respect to the filing of an application.

(b) Copies; service. Copies of an application shall be furnished in such number, and be filed and served in the manner and upon the persons specified in the form or instruction.

Rule 55. Notice of hearing

(a) Assignment; service and posting of notice; electronically recorded transcript. In those proceedings in which a hearing is to be held, the Commission will, by order or otherwise, assign a time and place for hearing. Such action will include notice when the transcript is to be made by electronic recording. Notice of such hearing will be posted in the Office of the Secretary of the Commission and will be served upon the parties and such other persons as may be entitled to receive notice under the Act.

Rule 56. Subpoenas—(a) Requests; particularity. Unless directed by the Commission upon its own motion, a subpena to compel a witness to produce documentary evidence will be issued only upon petition showing general relevance and reasonable scope of the evidence sought, which petition must also specify with particularity the books, papers, or documents desired, and the facts expected to be proved thereby: *Provided, however,* That for good cause shown, in lieu of a petition, the request for such a subpena may be made orally upon the record to the officer presiding

at the hearing. A request for issuance of a subpena other than to compel the production of documentary evidence may be made either by letter (original only need be filed with the Commission) or orally upon the record to the officer presiding at the hearing. A showing of general relevance and reasonable scope of the evidence sought may be required and the subpena will be issued or denied accordingly.

(b) Issuance. A subpena may be issued by the Commission or by the officer presiding at the hearing, but only under the signature of the Secretary or of a member of the Commission.

(c) Service. The original subpena shall be exhibited to the person served, shall be read to him if he is unable to read, and a copy thereof shall be delivered to him by the officer or person making service.

(d) Return. If service of subpena is made by a United States marshall or his deputy, such service shall be evidenced by his return thereon. If made by any other person, such person shall make affidavit thereof, stating the date, time, and manner of service; and return such affidavit on, or with, the original subpena in accordance with the form thereon. In case of failure to make service the reasons for the failure shall be stated on the original subpena. The written acceptance of service of a subpena by the person named therein shall be sufficient without other evidence of return. The original subpena, bearing or accompanied by the required return, affidavit, statement, or acceptance of service, shall be returned forthwith to the Secretary of the Commission, or, if so

directed on the subpena, to the officer presiding at the hearing at which the person subpenaed is required to appear.

(e) Witness fees. A witness who is summoned and responds thereto is entitled to the same fee as is paid for like service in the courts of the United States. Such fee is to be paid by the party at whose instance the testimony is taken at the time the subpena is served, except that when the subpena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered at the time of service.

Rule 57. Depositions; preliminary—(a) When permissible. The Commission will either upon its own initiative, or for good cause shown by a party to a proceeding, issue an order to take a deposition.

(b) Officer before whom taken. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Within a foreign country a deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission.

(c) When taken. Unless under special circumstances and for good cause shown, no deposition shall be taken within 10 days prior to the assigned date of the hearing in such proceeding, and when the deposi-

tion is taken in a foreign country it shall not be taken within 30 days prior to such date of hearing.

(d) Fees. A witness whose deposition is taken pursuant to these rules and the officer taking same, unless he be employed by the Commission, shall be entitled to the same fee paid for like service in the courts of the United States, which fee shall be paid by the party at whose instance the deposition is taken.

Rule 58. Depositions; petitions. A petition requesting an order to take a deposition shall be filed with due regard to the time periods specified in rule 57(c) and shall set forth the name and address of the witness, the place where, the time when, the name and office of the officer before whom, and the cause or reason why such deposition should be taken.

Rule 59. Depositions; order; interrogatories—(a) Order. If the petition requesting an order to take a deposition is granted which action may be taken without awaiting the possible filing of a reply, the Commission will serve upon the parties an order which will name the witness whose deposition is to be taken, and specify the time when, the place where, and the officer before whom the witness is to testify, but such time and place, and the officer before whom the deposition is to be taken, so specified in the Commission's order, may or may not be the same as set out in the petition.

(b) Interrogatories. In lieu of participating in the oral examination, parties served with the order for the taking of a deposition may promptly transmit written interrogatories to the officer, who shall pro-

pound them to the witness and record the answers verbatim, but it is not necessary that such interrogatories be served upon the party at whose instance the deposition is taken.

Rule 60. Depositions; recordation of testimony. The officer before whom the deposition is to be taken shall observe the provisions respecting appearances (rule 71(a)), and typographical specifications (rule 15), put the witness on oath, and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise to record the evidence.

Rule 61. Depositions; objections. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections.

Rule 62. Depositions; deponent's signature. When the testimony is fully transcribed or otherwise recorded the deposition of each witness shall be submitted to him for examination and shall be read to or by him. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The depo-

sition shall then be signed by the witness, unless the parties by stipulation waive the signing, or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall state at the foot thereof the fact of the waiver or of the illness or absence of the witness, or the fact of the refusal to sign, together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless, on a motion to suppress, the Commission finds that the reasons given for the refusal to sign are sufficient to require rejection of the deposition in whole or in part.

Rule 63. Depositions; officer's attestation. The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and that the officer is not of counsel or attorney for any of the parties, and that he is not interested in the event of the proceedings.

Rule 64. Depositions; return to Commission. The officer shall securely seal the deposition in an envelope endorsed with the title of the proceeding, and shall promptly send the original and one copy thereof, together with the original and one copy of all exhibits, by registered mail to the Secretary of the Commission. The deposition must reach the Commission not later than 5 days before the date of the hearing at which it is to be offered as evidence.

Rule 65. Depositions; notice of filing. The party taking the deposition shall give prompt notice of its filing to all other parties.

Rule 66. Depositions; copies. Upon payment of reasonable charges therefor, the officer before whom the deposition is taken shall furnish a copy of it to any interested party or to the deponent.

Rule 67. Depositions; inclusion in record. At the oral hearing, if one is held, the deposition shall be offered in evidence by the party at whose instance it was taken. If not offered by such party, it may be offered in whole or in part by the adverse party. If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it, which is relevant to the part introduced, and any party may introduce any other parts. Such deposition shall be admissible in evidence subject to such objections as to competency of the witness, or to the competency, relevancy, or materiality of the testimony as were noted at the time of taking of said deposition, or are made at the time it is offered in evidence.

HEARINGS

Rule 68. Prehearing conferences—(a) Purposes. Upon written notice by the Commission in any proceeding, or upon written or oral instruction of an officer, parties or their attorneys may be directed to appear before an officer at a specified time and place for a conference, prior to or during the course of a hearing, or in lieu of personally appearing to submit suggestions in writing, for the purpose of formulating issues and considering:

(1) The simplification of issues;

(2) The necessity or desirability of amending the pleadings either for the purpose of clarification, amplification, or limitation;

(3) The possibility of making admissions of certain averments of fact or stipulations concerning the use by either or both parties of matters of public record, such as annual reports and the like, to the end of avoiding the unnecessary introduction of proof;

(4) The procedure at the hearing;

(5) The limitation of the number of witnesses;

(6) The propriety of prior mutual exchange between or among the parties of prepared testimony and exhibits; and

(7) Such other matters, including disposition of requests for discovery, as may aid in the simplification of the evidence and disposition of the proceeding.

(b) Facts disclosed privileged. Facts disclosed in the course of the prehearing conference are privileged and, except by agreement, shall not be used against participating parties either before the Commission or elsewhere unless fully substantiated by other evidence.

(c) Recordation and order. Action taken at the conference, including a recitation of the amendments allowed to the pleadings, the agreements made by the parties as to any of the matters considered and defining the issues, shall be recorded in an appropriate order, unless the parties enter upon a written stipu-

lation as to such matters, or agree to a statement thereof made on the record by the officer.

(d) Objection to the order; subsequent proceedings. If an order is entered a reasonable time shall be allowed to the parties to present objections on the ground that it does not fully or correctly embody the agreements reached at such conference. Thereafter the terms of the said order or modification thereof, the written stipulation, or statement of the officer, as the case may be, shall determine the subsequent course of the proceedings, unless modified to prevent manifest injustice.

Rule 69. Stipulations. Apart from the procedure contemplated by the prehearing provisions (rule 68), and upon permission granted, the parties may in the discretion of the officer, by stipulation in writing filed with the Commission at any stage of the proceeding, or orally made at the hearing, agree upon any pertinent facts in the proceeding. It is desired that the facts be thus agreed upon so far as and whenever practicable.

Rule 71. Appearances; standard of conduct; absence from hearing—(a) Who may appear. Any individual may appear for himself, and any member of a partnership which is a party to any proceeding may appear for such partnership upon adequate identification. A bona fide officer or a full-time employee of a corporation, association, or of an individual may appear for such corporation, association, or individual by permission of the officer presiding at the hearing. A party also may be represented by a practitioner.

(b) Appearances. An appearance may be either general, that is, without reservation, or it may be special, that is, confined to a particular issue or question. When a practitioner enters an appearance at a hearing he will be expected to represent his client faithfully until the completion of the proceeding in which he has been retained, or until the completion of the part of the proceeding for which he has specially appeared. A practitioner who has entered his appearance at the hearing shall not be permitted to withdraw from the hearing, or wilfully to absent himself therefrom, except for good cause and, wherever practicable, only with the permission of the presiding officer. If a person desires to appear specially, he must expressly so state when he enters his appearance and at that time he shall also state the questions or issues to which he is confining his appearance; otherwise, his appearance will be considered as general.

(c) Standard of conduct. Contemptuous conduct by any person appearing at a hearing shall be ground for his exclusion by the presiding officer from the hearing.

(d) Absence from hearing. If a party or his representative shall, after entering an appearance, attempt to withdraw from the hearing in a manner other than that specified in paragraph (b) of this rule, the Commission on its own motion, or on motion of any party to the proceeding, may take such action as, in the interest of justice and the protection of the lawful rights of all parties to the proceeding, the cir-

cumstances of the case may warrant, including the striking out of all or any part of any pleading of the offending party, and including the possible dismissal of the action or proceeding, or any part thereof, the entry of an order of default against that party, or the disciplining of the practitioner concerned.

Rule 72. Intervention; petitions—(a) Content generally. A petition for leave to intervene must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or opposition to the relief sought. If the proceeding be by formal complaint and affirmative relief is sought by petitioner, the petition should conform to the requirements for a formal complaint.

(b) When filed. A petition for leave to intervene in any proceeding should be filed prior to or at the time the proceeding is called for hearing, but not after except for good cause shown.

(c) Broadening issues; filing. If the petitioner seeks a broadening of the issues and shows that they would not thereby be unduly broadened, and in respect thereof seeks affirmative relief, the petition should be filed in season to permit service upon and answer by the parties in advance of the hearing.

(d) Copies; service; replies. When tendered at the hearing, sufficient copies of a petition for leave to intervene must be provided for distribution as motion papers to the parties represented at the hearing. If leave be granted at the hearing, one additional copy must be furnished for the use of the Commis-

sion. When a petition for leave to intervene is not tendered at the hearing, the original and two copies of the petition shall be submitted to the Commission together with a certificate that service in accordance with rule 22 has been made by petitioner. Any reply in opposition to a petition for leave to intervene not tendered at the hearing must be filed within 20 days after service. In the discretion of the Commission leave to intervene may be granted or denied before the expiration of the time allowed for replies.

(e) Disposition. Leave will not be granted except on averments reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted the petitioner thereby becomes an intervener and a party to the proceeding.

Rule 73. Participation without intervention. In an investigation proceeding, in a proceeding under paragraphs (18) to (20) inclusive of section 1 [49 U.S.C.A. § 1(18)-(20)], or sections 5 and 13a of Part I [49 U.S.C.A. § 5, 13a], in application proceedings under Parts II, III, and IV [49 U.S.C.A. §§ 301 et seq., 901 et seq., and 1001 et seq.], and in a proceeding of any one of the characters herein enumerated when heard on a consolidated record with a complaint proceeding, but in no other proceeding, an appearance may be entered at the hearing without filing a petition in intervention or other pleading, if no affirmative relief is sought, if there is full disclosure of the identity of the person or persons in whose behalf the appearance is to be entered, if the interest of such person in the proceeding and the po-

sition intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed. A person in whose behalf an appearance is entered in this manner becomes a party to the proceeding.

Rule 75. Evidence; admissibility generally. Any evidence which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, shall be admissible in hearings before the Commission. The rules of evidence shall be applied in any proceeding to the end that needful and proper evidence shall be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.

Rule 77. Evidence; prepared statements. With the approval of the officer, a witness may read into the record, as his testimony, statements of fact or expressions of his opinion prepared by him, or written answers to interrogatories of counsel, or a prepared statement of a witness who is present at the hearing may be received as an exhibit, provided that the statement shall not include argument; that before any such statement is read, or admitted in evidence the witness shall deliver to the officer, the reporter, and to opposing counsel as may be directed by the officer, a copy of such statement or of such interrogatories and his written answers thereto; and that the admissibility of the evidence contained in such statement

shall be subject to the same rules as if such testimony were produced in the usual manner, including the right of cross-examination of the witness. Such approval ordinarily will be denied when in the opinion of the officer the memory or demeanor of the witness may be of importance.

Rule 78. Evidence; official records. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified

tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry. This rule does not prevent the proof of official records or of entry or lack of entry therein or official notice thereof by a method authorized by any applicable statute or by the rules of evidence.

Rule 79. Evidence; entries in regular course of business. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, will be admissible as evidence thereof if it shall appear that it was made in the regular course of business, and that it was the regular course of business to make such memorandum or record at the time such record was made, or within a reasonable time thereafter.

Rule 80. Evidence; documents containing matter not material. When material and relevant matter offered in evidence is in a document containing other matter not material or relevant, the offering party shall produce the document at the hearing, shall plainly designate the matter so offered, and shall accord to the officer and to participating counsel an opportunity to inspect it. Unless it is desired to read such matter into the record, and the officer so directs, true copies in proper form of the material and relevant matter taken from the document may be received as an exhibit, but other parties shall be affiorded an opportunity to introduce in evidence, in like manner,

other portions of such document if found to be material and relevant. The document itself will not be received.

Rule 82. Evidence; records in other Commission proceedings. If any portion of the record before the Commission in any proceeding other than the one on hearing is offered in evidence a true copy of such portion shall be presented for the record in the form of an exhibit unless:

(a) The party offering the same agrees to supply such copy later at his own expense, if and when required by the Commission; and

(b) The portion is specified with particularity in such manner as to be readily identified; and

(c) The parties represented at the hearing stipulate upon the record that such portion may be incorporated by reference, and that any other portion offered by any other party may be incorporated by like reference subject to paragraphs (a) and (b) of this rule; and

(d) The officer directs such incorporation. Any such portion so offered, whether in the form of an exhibit or by reference, shall be subject to objection.

Rule 83. Evidence; abstracts of documents. When documents, such as freight bills or bills of lading, are numerous, the officer may refuse to receive in evidence other than a limited number of such documents said to be typical. Instead he may instruct, if the proffer be for the purpose of proving damage, that introduction be deferred until there is opportunity

to comply with rule 100. If the proffer be for other purpose the officer may require the party in orderly fashion to abstract the relevant data from the documents, affording other parties reasonable opportunity to examine both the documents and the abstract, and thereupon offer such abstract in evidence in exhibit form.

Rule 84. Evidence; exhibits—(a) Generally. Exhibits of a documentary character may have a maximum width of 22 inches by 12½ inches in height. Whenever practicable the sheets of each exhibit and the lines of each sheet should be numbered. If the exhibit consists of five or more sheets the first sheet or title-page should be confined to a brief statement of what the exhibit purports to show, with reference by sheet and line to illustrative or typical examples contained therein. The exhibit should bear an identifying number, letter, or short title which will readily distinguish it from other exhibits offered by the same party. It is desirable that, whenever practicable, rate comparisons and other evidence should be condensed into tables. Whenever practicable, especially in proceedings in which it is likely that many documents will be offered, all the documents produced by a single witness should be assembled and bound together, suitably arranged and indexed, so that they may be identified and offered as one exhibit. Exhibits should not be argumentative and should be limited to statements of fact, and be relevant and material to the issue, which can better be shown in that form than by oral testimony.

(b) Reference to tariff authority, routes, and distances. All exhibits showing rates, fares, charges, or other tariff or schedule provisions must, by appropriate Interstate Commerce Commission number reference, indicate the tariff or schedule authority therefor, and if distances are shown must also show the authority therefor and, by lines, highways, or waterways, and junction points, the routes over which the distances are computed; except that the routes over which the distances are computed need not be shown when such distances are specifically published in a tariff or schedule lawfully on file with the Commission, or definitely ascertainable from a tariff or schedule on file with the Commission showing rates prescribed by the Commission and based on short-line distances, or short-highway distances, provided the exhibit makes specific reference to such tariff or schedules as provided by this rule.

(c) Copies. Unless the officer shall otherwise direct, the original and one copy of each exhibit of a documentary character shall be furnished for the use of the Commission—original to be delivered to the reporter, and the copy to the officer. If the hearing be before a board, a copy of the exhibit shall be furnished to each member of the board, unless the board otherwise directs. Unless the officer for cause directs otherwise, a reasonable number of copies shall be furnished to counsel in attendance at the hearing. Unless the officer shall otherwise direct, in proceedings under the Uniform Bankruptcy Act [11 U.S.C.A. § 1 et seq.], the original and three copies of every exhibit of

a documentary character shall be furnished for use of the Commission—original to be delivered to the reporter, and the three copies to the officer.

(d) Interchange prior to hearing.—Whenever practicable, the parties should interchange copies of exhibits or other pertinent material or matter before or at the commencement of the hearing; and the Commission or presiding officer may so direct.

(e) When excluded how treated. In case an exhibit has been identified, objected to, and excluded, the officer will develop whether the party offering the exhibit withdraws the offer, and if so, permit the return of the exhibit to him. If the excluded exhibit is not withdrawn it should be given an exhibit number for identification and be incorporated in the record. Exhibit numbers once used for identification will not be duplicated thereafter.

Rule 86. Evidence; filing of subsequent to hearing; copies. Except as provided below or as expressly may be permitted in a particular instance, the Commission will not receive in evidence or consider as part of the record any documents, letters, or other writings submitted for consideration in connection with any proceeding after close of the hearing, and may return any such documents to the sender. Before the close of a hearing the officer may, at the request of a party or upon his own motion, or upon agreement of the parties, require that a party furnish additional documentary evidence supplementary to the existing record, within a stated period of time. Documentary evidence thus to be furnished will not be

assigned an exhibit number at the hearing, but the document will be given an exhibit number at the time of filing and the parties accordingly advised. Unless otherwise directed by the officer, the original and one copy of such submission shall be filed with the Commission.

Rule 87. Evidence; objections to. Formal exception to a ruling of an officer at a hearing is unnecessary. It is sufficient that a party, at the time the ruling is made or sought, make known to the officer on the record the action which he desires the officer to take or his objection to the action of the officer and his grounds therefor. An objection not pressed in brief will be considered as waived. Where no brief is filed an objection will be considered as waived if not pressed in exceptions or reply to exceptions, if filed, or in a separate petition dealing only with that objection.

Rule 88. Oral argument before officer.

If oral argument before the officer is desired, he should be so notified at or before the hearing and may arrange to hear the argument at the close of the testimony within such limits of times as he may determine, having regard to other assignments for hearing before him. Such argument will be recorded and made a part of the transcript of testimony, and will be available to the Commission for consideration in deciding the case. The making of such argument shall not preclude oral argument before the Commission and request therefor may be made as provided in Rule 98.

Rule 89. Continuance for further hearing. A continuance may be granted by the presiding officer if it is impossible to conclude a hearing within the time available, or for any reason a continuance is necessary or advisable, but a joint board shall not set a date and place for a continued hearing without first consulting the Commission. If consultation with the Commission is impracticable, the hearing shall be adjourned by the joint board to such time and place as the Commission subsequently shall determine.

Rule 90. Transcript of record—(a) Filing. After the close of the hearing the complete transcript of testimony taken and the exhibits shall be filed with the Commission.

(b) Corrections. A suggested correction in a transcript ordinarily will be considered only if offered not later than 20 days after the date each transcript is filed with the Commission. A copy of the letter (original only need be filed with the Commission) requesting the suggested corrections shall be served upon all parties of record and with 2 copies to the official reporter.

(c) No free copies. No free copies of transcript will be furnished to any party to any proceeding.

Rule 91. Briefs; content and arrangement—(a) Due date. The due date of each brief must appear on its front cover or title page.

(b) Table of contents; citations. A brief of more than 20 pages shall contain on its front flyleaves a table of contents and points made with page refer-

ences, the table of contents to be supplemented by a list of citations, alphabetically arranged, with references to the pages where they appear.

(c) Sketch or chart. In proceedings wherein misrouting or undue prejudice or preference are alleged, the complainant should include as part of the brief a small sketch or chart adequately reflecting the situation.

(d) Evidence abstract. A brief filed after a hearing should contain an abstract of the evidence relied upon by the party filing it, preferably assembled by subjects, with reference to the pages of the record, if written, or exhibit where the evidence appears. The abstract should follow the statement of the case and precede the argument. In the event the party elects not to include a separate abstract in his brief, he should give specific reference to the portions of the record, whether transcript or otherwise relied upon in support of the respective statements of fact made throughout the brief.

(e) Requested findings. Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make.

(f) Exhibit reproduction. Exhibits should not be reproduced in the brief, but may, if desired, be shown, within reasonable limits, in an appendix to the brief. Analyses of such exhibits should be included in the abstract of evidence under the subjects to which they pertain.

Rule 92. Briefs; when officer's report is served

In a proceeding which has been the subject of oral hearing, and in which an officer's report is to be prepared and served, which fact will be stated by the officer on the record, only one brief shall be filed by each party. The officer shall fix for all parties the same time within which to file briefs, which time shall not exceed 45 days from the close of the hearing unless otherwise ordered by the Commission. Reply briefs are not permitted unless ordered by the Commission.

Rule 93. Briefs; when officer's report is not served

In a proceeding which has been the subject of oral hearing, and in which no officer's report is to be prepared and served, which fact will be stated by the officer on the record, only one brief shall be filed by each party. The officer shall fix for all parties the same time within which to file briefs, which time shall not exceed 45 days from the close of the hearing unless otherwise ordered by the Commission. Reply briefs are not permitted unless ordered by the Commission.

Rule 94. Briefs of interveners

Briefs of interveners shall be filed and served within the time fixed for the brief of the party in whose behalf the intervention is made.

Rule 95. Officer's report; when and how served. After expiration of the time set for filing briefs, if the proceeding be one in which a hearing has been

held, the officer's report will be prepared and served by mailing a copy to each party. An officer's report prepared in a proceeding in which a hearing has not been held will be served by mailing a copy to each party of record and to any other persons not parties to the proceeding who are believed to have an interest in the proceeding.

Rule 97. Effect of exceptions or absence thereof—(a) Upon report and recommended order. The filing of exceptions to a recommended order operates to stay the effectiveness of the order and thereafter decision by the Commission will be made in due course. If no exception is filed to the recommended order and the Commission does not stay it, the recommended order becomes the order of the Commission upon expiration of the period for filing exceptions provided in rule 96(b), or of any postponement of such period, or postponement of the effective date of such order, and a notice stating that the recommended order has, giving the date, become the order of the Commission will be mailed to the parties by the Commission.

(b) Upon proposed report. A proposed report will not become the decision of the Commission through failure to file objections, but in the absence of exceptions or of ascertained error the officer's statement of the issues and of the facts ordinarily will be taken by the Commission as the basis of its decision.

Rule 98. Oral argument before Commission—(a) Request; how made. If no officer's report is to be served, request for oral argument before the Commission must be made at hearing or by letter (origi-

nal only need be filed with the Commission) within 10 days after the hearing. If an officer's report is to be served, the request for oral argument must be included as part of the exceptions brief or reply thereto.

(b) Request for time allotment. If the petition is granted a notice will be served by the Commission upon the parties setting the date for the oral argument. At least 10 days before that date any party desiring to participate in the oral argument must make request by letter (original only need be filed with the Commission) for an allotment of time. Only those making request in this manner will be permitted to participate.

Rule 102. Petitions not otherwise covered

When the subject matter of any desired relief is not specifically covered by the rules in this part, a petition seeking such relief, which relief shall be construed as including appropriate discovery procedures, and stating the reasons therefor may be served and filed.

Rule 247. Special rules governing notice of filing of applications by motor carriers of property or passengers and brokers under sections 206 (except section 206(a) (6) relating to Certificates of Registration), 209, and 211, by water carriers under sections 302(e), 303, and 309, and by freight forwarders under section 410 of the Interstate Commerce Act, and certain other procedural matters with respect thereto.

(a) Scope and applicability of special rules—(1) Scope. These special rules govern the filing and

handling pursuant to the provisions of the Interstate Commerce Act of (i) applications for certificates, permits, and licenses respecting the transportation of property or passengers under sections 206 [49 U.S.C.A. § 306] (except section 206(a)(6) [49 U.S.C.A. § 306(a)(6)] relating to Certificates of Registration), 209, and 211 [49 U.S.C.A. §§ 309, and 311], (ii) applications for certificates, permits, and exemptions respecting the water transportation of property or passengers under sections 302(e), 303, and 309 [49 U.S.C.A. §§ 902(e), 903, and 909], and (iii) applications for permits to operate as freight forwarders and for certificates of abandonment under section 410 [49 U.S.C.A. § 1010]. Except as otherwise herein provided, the general rules of practice shall apply.

(2) Applicability. These special rules shall apply to all applications enumerated in subparagraph (1) of this paragraph and filed with the Commission on and after May 20, 1966, and to such of those applications filed prior to that time as the Commission may designate by appropriate publication in the FEDERAL REGISTER.

(b) Applications—(1) Form and content. An application filed with the Commission under these special rules shall be prepared in accord with and contain the information called for in the form of application prescribed by the Commission or in instructions which may have been issued by the Commission with respect to the filing of such an application.

(2) Copies and service. Copies of an application filed under these special rules shall be furnished in

such number and shall be filed and served in the manner and upon the persons specified in the form or instructions.

(3) Requests for handling applications without oral hearing. An applicant who believes its application is susceptible of handling without oral hearing may request such handling when the application is filed. If such a request is made at that time, the applicant shall submit with its application original verified statements of the facts to which its witnesses would testify at an oral hearing if one were held, together with one copy thereof which need not be verified. Applicant shall furnish copies of its verified statements to interested persons upon request from such interested persons.

(c) Notice to interested persons. (1) Notice of the filing of applications to competitors and other interested persons will be given by the publication of a summary of the authority sought in the FEDERAL REGISTER. Such summaries will be prepared by the Commission, and it shall be the responsibility of applicant promptly to advise the Commission if the summary does not properly describe the authority sought. No other notice by applicants to interested persons is required, except that applicants are not relieved from the obligation to file copies of applications with Governors, State Boards, and Regional Directors of the Commission's Bureau of Operations and Compliance as may be required by the prescribed form of the application.

(2) Amendments. Except for good cause shown, amendments to applications which broaden the scope of the proposed operations will not be allowed if tendered after notice of the filing of an application has been published in the *Federal Register*. Restrictive amendments acceptable to the Commission may be submitted at any time, but if tendered after such publication, they may be allowed only in the discretion the Commission or by the hearing officer if the matter is assigned for hearing or prehearing conference.

(6) Except where a restrictive amendment has been made as provided in subparagraph (5) of this paragraph, or for good cause shown, the failure of any person filing a protest to an application to appear at a hearing scheduled thereon shall be construed as a waiver of its right to participate further in the proceeding; such person shall no longer be considered as a party to the proceeding, and it and any representative responsible for its participation in the proceeding may be subject to censure for failure to appear. In addition, the mere appearance of protestant without the presentation of evidence of protestant's own operations and particular interest in the application may, in the absence of good cause shown, subject protestant and its representative to similar censure.

(7) An interested person, not a protestant, desiring to receive notice of the time and place of any hearing, conference, or other proceedings shall notify the Commission by telegram or letter (original and

one copy) within 30 days from the date of the publication of the notice of the filing of the application in the FEDERAL REGISTER.

(e) Hearing or other procedures to be followed—(1) Determination. The Commission will determine whether an assignment for oral hearing should be made, after notice to interested persons of the filing of the application has been published in the FEDERAL REGISTER and the period for filing protests has expired. At or prior to such time, any applicant who does not intend to prosecute its application should promptly request dismissal thereof.

(2) Uncontested proceedings. Proceedings in which no protests are filed within 30 days after publication of notice in the FEDERAL REGISTER, and which are not assigned for oral hearing, will be determined on the basis of verified statements submitted by applicant. Where not submitted previously along with the application as provided in paragraph (b) (3) of this section, such statements, by order, will be required to be filed by the applicant with the Commission within the time prescribed in said order, failing which the application may be summarily dismissed for want of prosecution.

(3) Contested proceedings. In those contested proceedings which the Commission determines that assignment of an application for oral hearing is unnecessary, thereafter the procedure shall be in accordance with Rules 45(b), 46(b), and 47-54, inclusive, of the general rules of practice, except that only the original and one copy of any statement made

pursuant to Rule 51 need be filed with the Commission. All other contested proceedings which are subject to these rules will be assigned for oral hearing, unless other procedures are ordered.

(f) Withdrawal or dismissal of contested applications. If protests to its application have been filed, applicant shall, within 30 days after the period for filing protests has expired, notify the Commission in writing (1) that it is ready to proceed and prosecute the application, or (2) that it wishes to withdraw the application. Failure so to notify the Commission will be construed to mean that applicant has no further interest in the application, and the application will thereupon be dismissed by the Commission. Withdrawal of the application after the 30-day period or failure by applicant to appear at a hearing scheduled thereon will, except for good cause shown, subject applicant and its representative to censure.

(g) Notice of hearing, conference or other proceedings—(1) Initial assignment. Notice of the time and place of any hearing, conference, or other proceedings will be given to applicant's representative, applicant, protestants, and other interested parties by mailing to them the order or notice assigning the application for hearing, conference, or other procedure.

(2) Assignment of an application for hearing concurrently with notice of its filing. For the convenience of the Commission in handling applications related to one or more applications which already have been noticed in the FEDERAL REGISTER, when, in the

Commission's discretion, the public interest would be served, an application may be concurrently noticed and assigned for hearing provided appropriate publication in the FEDERAL REGISTER can be made at least 1 week prior to the assigned date of hearing. Where such action is taken, and regardless of any prior publication of the application, any interested person may, without filing a protest prior to the assigned hearing, appear at the hearing in opposition to the application so assigned and become a party and be entitled to participate in that proceeding.

(3) Requests for change. A request by any party for a change in the time or place of an assigned hearing must set forth good and sufficient cause for the action requested, must be in writing and filed with the Commission not less than 10 days before the assigned hearing date, except in emergency circumstances, and must be served on all known parties of record at the same time and by the same method of communication as service is made on the Commission. Where such requests are filed less than 10 days before the date of hearing, the petitioning party shall state the reasons for his failure to make such request within the prescribed 10 days.

(4) Notice of changes. The applicant's representative (or applicant if it has no representative), protestants, and those who request notice of changes in time or place of hearing, conference, or other proceeding will be informed of such changes if notice is given by mail. If telegraphic notice becomes necessary, notice of such changes will be given by telegram

only to those who request telegraphic notice at their expense.

(h) Intervention. Rule 73 relating to participation without intervention is inapplicable to applications subject to this section, except with respect to those persons seeking to intervene in support. No person who fails to file a protest as provided in these rules will be permitted to intervene in opposition in a proceeding except upon a showing of substantial reasons in a petition submitted in accordance with Rule 72.

(i) Drafting of recommended order and report by prevailing party. Applications in which oral hearings are held and in which the hearing officer can announce his decision, either (1) on the record after the close of the taking of testimony or (2) by appropriate notification to the parties after the filing of briefs, may be made the subject of a report and recommended order, prepared by the party or parties in whose favor the hearing officer decides, within a period specified by the hearing officer. The hearing officer will make such changes as he considers appropriate in the draft prepared for him.

Appendix A—Code of Ethics for Practitioners Before the Interstate Commerce Commission

Preamble

No rules of conduct can be framed which will particularize all the duties of the practitioner in the varying phases of litigation or in his relations to clients, adversaries, other practitioners, the Commission and the public. The following canons of ethics are adopted as a general guide for those admitted to practice before the Interstate Commerce Commission.

It will be remembered that the practitioners before the Commission include (a) lawyers, who have been regularly admitted to practice law, and (b) others having traffic or other technical experience qualifying them to aid the Commission in administration of the Interstate Commerce Act and related acts of Congress. The former are bound by a broad code of ethics and unwritten rules of professional conduct which apply to every activity of a lawyer; for the latter, no code of ethics has been written heretofore. The following canons do not release the lawyer from any of the duties or principles of professional conduct by which lawyers are bound. They apply alike to all practitioners before the Commission and the setting forth therein of particular duties or principles of conduct should not be construed as a denial of the existence of others equally imperative although not specifically mentioned. The world "Commission" as used herein includes Divisions of the Commission, and the representatives of the Commission, whether mem-

bers, examiners, or other employees connected with the matter in hand.

Canons of Ethics

1. *Standards of ethical conduct in courts of United States to be observed.* These canons are in furtherance of the purpose of the Commission's rules of practice which enjoin upon all persons appearing in proceedings before it to conform, as nearly as may be, to the standards of ethical conduct required of practitioners before the courts of the United States; and such standards are taken as the basis for these specifications, modified in so far as the nature of the practice before the Commission requires.

2. *The duty of the practitioner to and his attitude towards the Commission.* It is the duty of the practitioner to maintain towards the Commission a respectful attitude, not for the sake of the temporary incumbent of the office, but for the maintenance of the importance of the functions he administers. *In many respects the Commission functions as a Court, and practitioners should regard themselves as officers of that Court and strive to uphold its honor and dignity.* The Commission, not being wholly free to defend itself is peculiarly entitled to receive the support of the practitioner against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a member or employee of the Commission it is the right and duty of the practitioner to submit his grievances to the proper authorities. In such cases,

but not otherwise, such charges should be encouraged and the person making them should be protected.

4. *Attempts to exert political influence on the Commission.* It is unethical for a practitioner to attempt to sway the judgment of the Commission by propaganda, or by enlisting the influence or intercession of members of the Congress or other public officers, or by threats of political or personal reprisal.

5. *Attempts to exert personal influence on the Commission.* Marked attention and unusual hospitality on the part of a practitioner to a Commissioner, examiner, or other representative of the Commission, uncalled for and unwarranted by the personal relations of the parties, subject both to misconstruction of motive and should be avoided. A self-respecting independence in the discharge of duty, without denial or diminution of the courtesy and respect due the official station is the only proper foundation for cordial personal and official relations between Commission and practitioners.

7. *The practitioner's duty in its last analysis.* No client, corporate or individual, however powerful, no cause, civil or political however important, is entitled to receive, and no practitioner should render, any service or advice involving disloyalty to the law or disrespect of its official ministers, or corruption of any person or persons exercising a public office or employment or private trust, or deception or betrayal of the public. In rendering any such improper service or advice the practitioner invites and merits stern and just condemnation. Correspondingly, he advances

the honor of his calling and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, although until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all he will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

8. *Private communications with the Commission. In the disposition of contested proceedings brought under the Interstate Commerce Act* [*49 U.S.C.A. §§1 et seq., 301 et seq., 901 et seq., 1001 et seq., 1231 et seq.*] *the Commission exercises quasi-legislative powers, but it is nevertheless acting in a quasi-judicial capacity.* It is required to administer the Act and to consider at all times the public interest beyond the mere interest of the particular litigants before it. *To the extent that it acts in a quasi-judicial capacity, it is grossly improper for litigants, directly or through any counsel or representative, to communicate privately with a commissioner, examiner or other representative of the Commission about a pending cause, or to argue privately the merits thereof in the absence of their adversaries or without notice to them.* Practitioners at all times should scrupulously refrain in their communications to and discussions with the Commission and its staff from going beyond ex parte

representations that are clearly proper in view of the administrative work of the Commission.

9. Adverse influences and conflicting interests. It is the duty of a practitioner at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of the person to represent or assist him.

It is unethical to represent conflicting interets, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon a practitioner represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainsr or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

10. Joint association of practitioners and conflicts of opinion. A client's proffer of the assistance of additional practitioner should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A practitioner should decline association as colleague if it is objectionable to the practitioner first retained, but if the client should relieve the practitioner first retained, another may come into the case.

When practitioners jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted by them unless the nature of the difference makes it impracticable for the practitioner whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another practitioner are unworthy of those who should be brethren, but, nevertheless, it is the right of any practitioner, without fear or favor, to give proper advice to those seeking relief against an unfaithful or neglectful practitioner, generally after communication with the practitioner of whom the complaint is made.

11. Withdrawal from employment. The right of a practitioner to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The practitioner representing him should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the practitioner's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement or obligations as to fees or expenses, the practitioner may be warranted in withdrawing on due notice to the client, allowing him time to employ another. So also when a practitioner discovers that his client has no case

and the client is determined to continue it; or even if he finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is to be justified. Upon withdrawing from a case after a retainer has been paid, he should refund such part of the retainer as has not been clearly earned.

12. Advising upon the merits of a client's cause. A practitioner should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. He should beware of bold and confident assurances to clients, especially where employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

13. Negotiations with opposing party. A practitioner should not in any way communicate upon the subject of controversy with a party represented by another practitioner except upon express agreement with the practitioner representing such party; much less should he undertaken to negotiate or compromise the matter with him, but should deal only with the practitioner who represents the other party. It is incumbent upon the practitioner most particularly to avoid everything that may tend to mislead a party not represented by a practitioner, and he should not undertake to advise him as to the law.

14. Fixing the amount of the fee. In fixing fees, practitioners should avoid charges which overestimate

their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, although his poverty may require a less charge, or even none at all.

15. Compensation, commission and rebates. A practitioner should accept no compensation, commissions, rebates, or other advantages from parties to the proceeding other than his client without the knowledge and consent of his client after full disclosure.

16. Contingent fees. Contingent fees should be such only as are sanctioned by law. In no case, except a charity case, should they be entirely contingent upon success.

17. Division of fees. No division of fees for services is proper, except with a member of the bar or with another practitioner, based upon a division of service or responsibility. It is unethical for a practitioner to retain laymen to solicit his employment in pending or prospective cases, and reward them by a division of fees, and such a practice cannot be too severely condemned.

18. Suing clients for fees. Controversies with clients covering compensation are to be avoided in so far as compatible with self-respect and with the right to receive reasonable recompense for services: and lawsuits against clients should be resorted to only to prevent injustice, imposition or fraud.

19. Acquiring interest in litigation. The practitioner shall not purchase or otherwise acquire any

pecuniary interest in the subject matter of the litigation which he is conducting.

20. Expenses. A practitioner may not properly agree with a client that the practitioner shall pay or bear the expenses of litigation. He may in good faith advance expenses as a matter of convenience but subject to reimbursement by the client.

21. Witnesses. A practitioner shall not undertake that the compensation of a witness shall be contingent upon the success of the cause in which he is called. If the ascertainment of truth requires that a practitioner should seek information from one connected with or reputed to be biased in favor of an adverse party, he is not thereby deterred from seeking to ascertain the truth from such person in the interest of his client.

22. Dealing with trust property. Money of the client or other trust property coming into the possession of the practitioner should be reported promptly, and, except with the client's knowledge and consent, should not be commingled with the practictioner's private property or be used by him.

23. How far a practitioner may go in supporting a client's cause. Nothing will operate more certainly to create or foster popular prejudice against practitioners as a class, and deprive them of that full measure of public esteem and confidence which belongs to the proper discharge of their duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the

duty of the practitioner to do whatever may enable him to succeed in winning his client's cause.

The practitioner owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of the disfavor of the Commission or public unpopularity should restrain him from full discharge of his duty. The client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his counsel to assert every such remedy or defense. But it is to be steadfastly borne in mind that this great trust is to be performed within and not without the bounds of the law. Admission to the privilege of appearing before the Commission as representing another does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

24. *Restraining clients from improprieties.* A practitioner should use his best efforts to restrain and to prevent his clients from doing those things which he himself ought not to do, particularly with reference to their conduct towards the Commission, other practioners, witnesses and suitors. If a client persists in such wrongdoing the practitioner should terminate their relations.

25. *Ill-feeling and personalities between advocates.* Clients, not their representatives, are the litigants.

Whatever may be the ill-feeling existing between clients, it should not be allowed to influence practitioners in their conduct and demeanor toward each other or toward suitors in the case. All personalities between practitioners should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncracies of practitioners on the other side. Personal colloquies between practitioners which cause delay and promote unseemly wrangling should also be carefully avoided. Their statement should be addressed to the Commission.

26. *Treatment of witnesses and litigants.* A practitioner should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudice of a client in the trial or conduct of a cause. The client cannot be made the keeper of the practitioner's conscience in such matters. He has no right to demand that the practitioner representing him shall abuse the opposing party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

27. (None.)

28. *Discussion of pending litigation in public press.* Attempts to influence the action and attitude of the members and examiners of the Commission through propaganda, or through colored or distorted articles, in the public press, are more apt to react against than in favor of the parties resorting to such

measures. On the other hand, it is not against the public interest or unfair to the Commission that the facts of pending litigation shall be made known to the public through the press in a fair and unbiased manner and in dispassionate terms. Practitioners should themselves avoid, and should counsel their clients against, giving to the public press any press notices or statements of a nature intended to inflame the public mind, to stir up possible hostility toward the Commission, or to influence the Commission's course and judgment as to pending or anticipated litigation. When the circumstances of a particular case appear to justify a statement to the public through the press, it is unethical to make it anonymously.

29. Candor and fairness. The conduct of practitioners before the Commission and with other practitioners should be characterized by candor and fairness. The non-technical character and liberality of the Commission's practice call for scrupulous observance of the principles of fair dealing and just considerations for the rights of others.

It is not candid or fair for a practitioner knowingly to misstate or misquote the contents of a paper, the testimony of a witness, the language or the argument of an opposing practitioner, or the language or effect of a decision or a text book; or, with knowledge of its invalidity to cite as authority a decision which has been overruled or otherwise impaired as a precedent or a statute which has been repealed; or in argument to assert as a fact that which has not been

proved, or to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A practitioner should not offer evidence, which he knows the Commission should reject, in order to get the same before the Commission by argument for its admissibility, or arguments upon any point not properly calling for determination. He should not introduce into an argument remarks or statements intended to influence the by-standers.

These and all kindred practices are unethical and unworthy of a practitioner.

30. Right of practitioner to control the incidents of the trial. As to incidental matters pending the trial, not affecting the merits of the cause or working substantial prejudice to the rights of the client, such as forcing the opposing practitioner to trial when he is under affliction or bereavement, forcing the trial on a particular day to the injury of the opposing practitioner when no harm will result from trial at a different time, agreeing to extensions of time and the like, the practitioner and not the client, must be allowed to judge. In such matters no client has a right to demand that his practitioner shall be illiberal or do anything therein repugnant to the practitioner's sense of honor and propriety.

31. Taking technical advantage of opposing practitioner; agreements with him. A practitioner should not ignore known customs or practice of the Commission, even when the law permits, without giving timely notice to the opposing practitioner. In so far as possible, important agreements affecting the rights of clients should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing.

32. Advertising, direct or indirect. The most worthy and effective advertisement possible is the establishment of a well-merited reputation for capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not improper. But solicitation of employment by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unethical. It is equally unethical to procure business by indirection through touters of any kind. Indirect advertisement for employment by furnishing or inspiring newspaper comments concerning causes in which the practitioner has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the practitioner's positions, and all other like self-laudation, lower the tone of the calling and are intolerable.

33. Professional card. The simple professional card mentioned in Canon 32 may with propriety contain

only a statement of the practitioner's name (and those of his associates), occupation, address, telephone number, and special branch or branches of practice. Such cards may be inserted in reputable lists and may give authorized references, or name clients with their permission.

34. Stirring up litigation, directly or through agents. It is unethical for a practitioner to volunteer advice that a proceeding be brought before the Commission, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unethical but it is indictable at common law. It is disreputable for a practitioner to hunt up defects or other causes of action and disclose them in order to be employed to bring complaint, or to breed litigation by seeking out those having claims for damages or any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office to seek his services. No complaint should be brought before the Commission by a practitioner except with the distinct knowledge and specific consent of the client in the particular case. A duty to the public and to the Association devolves upon every member having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disciplined or disbarred.

35. Justifiable and unjustifiable litigation. The practitioner must decline to conduct a cause or to

make a defense when convinced that it is intended merely to harass or to injure the opposing party, or to work oppression or wrong. But otherwise it is his right, and having accepted retainer, it becomes his duty, to insist upon the judgment of the Commission as to the merits of his client's claim. His appearance should be deemed equivalent to an assertion upon his honor that in his opinion his client's case is one proper for determination.

36. Responsibility for litigation. No practitioner is obliged to act either as adviser or advocate for every person who may seek to become his client. He has the right to decline employment. Every practitioner upon his own responsibility must decide what employment he will accept, what causes he will bring before the Commission for complainants, or contest for defendants or respondents. The responsibility for advising as to questionable transactions, for bringing questionable proceedings, for urging questionable defenses is his alone. He cannot escape it by urging as excuses that he is only following his client's instructions, or that he is under a stated retainer or in the regular employment of his client.

37. Discovery of imposition and deception. When a practitioner discovers that some fraud or deception has been practiced, which has been unjustly imposed upon the Commission or a party, he should endeavor to rectify it; first by advising his client to forego any advantage thus unjustly gained and, if his client refuses, by promptly informing the injured person or

his counsel (practitioner), so that appropriate steps may be taken.

38. Upholding the honor of the calling. Practitioners should expose without fear or favor before the proper tribunals corrupt or dishonest conduct and should accept without hesitation employment against a practitioner who has wronged his client. The practitioner upon the trial of a cause in which perjury has been committed owes it to the Commission and to the public to bring the matter to the knowledge of the prosecuting authorities. The practitioner should aid in guarding the bar of the Commission against admission thereto of candidates unfit or unqualified because deficient in either moral character or education. A practitioner should propose no person for admission to practice before the Commission unless from personal knowledge or upon reasonable inquiry he sincerely believes and is able to vouch that such person possesses the qualifications prescribed in the Commission's rules of practice. He should strive at all times to uphold the honor and maintain the dignity of his calling and to improve not only the law but the administration of justice.

39. Intermediaries. The services of a practitioner should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and practitioner. His responsibility and qualifications are individual. He should avoid all relations which direct the performance of his duties in the interest of such intermediaries. His relation to

the client should be personal, and the responsibility should be direct to the client.

He may accept employment from any organization such as an association, club or trade organization, authorized by law to be a party to proceedings before the Commission, to render services in such proceedings in any matter in which the organization, as an entity, is interested. This employment should only include the rendering of such services to the members of the organization in respect to their individual affairs as are consistent with the free and untrammeled performance of his duties to the Commission.

Nothing in this canon shall be construed as conflicting with canon 17.

40. Retirement from public employment. A practitioner, having once held public office or having been in the public employ, should not after his retirement, accept employment as an advocate or adviser in the same proceeding or as to the same, or substantially the same, facts as were involved in any specific question which he investigated or passed upon in a judicial or quasi-judicial capacity while in such office or employ, whether the same or different parties are concerned.

41. Confidences of a client. The duty to preserve his client's confidences in the course of his employment outlasts the practitioner's employment, and extends as well to his employees. None of them should accept employment which involves the disclosure or use of these confidences, either for the private advan-

tage of the practitioner or his employees or to the disadvantage of the client, without knowledge and consent of the client even though there are other available sources of such information. A practitioner should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a practitioner is falsely accused by his client, he is not precluded from disclosing the truth in respect to the false accusation. The announced intention of a client to commit a crime is not included within the confidences which a practitioner is bound to respect. He may properly make such disclosures as to prevent the act or protect those against whom it is threatened.

Appendix C—Ex Parte Communications

1. Ex parte communications. (a) No person who is a party to, or counsel or agent of a party, or who intercedes in, any on-the-record proceeding, shall submit any ex parte communication concerning the merits of the proceeding to any member of the Commission, hearing officer, member of a joint board, or to any employee of the Commission participating in the decision in such proceeding.

(b) No member of the Commission, hearing officer, member of a joint board, or employee of the Commission participating in the decision in such proceeding shall invite or knowingly entertain any prohibited ex parte communication, or make any such communication to any party to, or counsel or agent of a party, or any other person who he has reason to know may

transmit such communication to a party or party's agent.

2. The prohibitions of paragraph 1 apply from the time an on-the-record proceeding is noticed for oral hearing or the taking of evidence by modified procedure or from such earlier time as the Commission may fix by rule or order in the particular case.

3. For the purposes hereof:

(a) "On-the-record proceeding" means a proceeding required by the Constitution, by statute, by Commission rule, or by order in the particular case, to be decided solely upon the record made in a Commission hearing.

(b) "Person who intercedes in any proceeding" means any individual outside the Commission (whether in public or private life), partnership, corporation, or association, other than a party or an agent of a party, who volunteers a communication which he may be expected to know may advance or adversely affect the interest of a particular party to the proceeding, whether or not he acts with the knowledge or consent of any party or any party's agent.

(c) "Ex parte communication concerning the merits" includes both oral and written communications, but the following classes of ex parte communications shall not be prohibited:

(1) Any oral or written communication which all the parties to the proceeding agree, or which the Commission, the hearing officer, or joint board formally rules, may be made on an ex parte basis.

(2) Any oral or written communication of facts or contentions which have general significance for an industry subject to regulation if the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive issue in appending on-the-record proceeding in which he is interested.

(3) Any communication by means of any news medium which in the ordinary course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publications with respect to pending on-the-record proceedings.

(d) "Any employee of the Commission participating in the decision" includes personal assistants to members of the Commission, members of an employee review board appointed pursuant to Public Law 87-247 (1961) to whom the proceeding may be referred for decision, employees of the Commission Bureau (e.g., Operating Rights, Finance, Rates and Practices) whose responsibilities correspond to the nature of the proceeding, and the staff of the General Counsel's Office.

4. Any member of the Commission, hearing officer, employer of the Commission, or member of a joint board, participating in the decision who personally receives a written or oral communication which he believes is prohibited at the time received, shall transmit the written communication or a written summary of the substance of an oral communication promptly to the Chairman of the Commission together with a

written statement of the circumstances under which the communication was made, if not apparent from the communication itself. If the Chairman concludes that the communication is prohibited, or that the dictates of fairness require that it be made public, he shall instruct the Secretary to place the written communication or summary of the oral communication in the correspondence part of the public docket of the proceeding or take such other or further action as may be appropriate under all of the circumstances.

5. The Commission may censure, or suspend or revoke the privilege to practice before the agency, of any person who knowingly and willfully makes or solicits the making of a prohibited ex parte communication.

6. To the extent permitted by law, the relief or benefit sought by a party to a proceeding may be denied if the party, or an agent of the party, knowingly and willfully makes or solicits the making of a prohibited communication.

7. The Commission may censure, suspend, or dismiss, or institute proceedings for the suspension or dismissal of, any Commission employee who knowingly and willfully violates the foregoing prohibitions or requirements.

5. CALIFORNIA CONSTITUTION

Art. XII § 22

Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff. The commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpenas and all necessary process and send for persons and papers; and the commission and each of the commisioners shall have the power to administer oaths, take testimony and punish for contempt *in the same manner and to the same extent as courts of record;* the commission may prescribe a uniform system of accounts to be kept by all railroad and other transportation companies.

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6. CALIFORNIA PUBLIC UTILITIES CODE

§ 312. Issuance and service of process: Fees

The commission and each commissioner may issue writs of summons, subpenas, warrants of attachment, warrants of commitment, and all necessary process in proceedings for contempt, in like manner and to

the same extent as courts of record. The process issued by the commission or any commissioner, extends to all parts of the State and may be served by any person authorized to serve process of courts of record, or by any person designated by the commission or a commissioner. The person executing any such process shall receive such compensation as is allowed by the commission, not to exceed the fees prescribed by law on August 8, 1915, for similar services, and such fees shall be paid in the same manner as provided in this part for payment of the fees of witnesses.

§ 1061. Operation except in accordance with provisions of part forbidden

No highway carrier, cement carrier, or petroleum irregular route carrier, shall operate or cause to be operated any auto truck, or other self-propelled vehicle not operated on rails, for the transportation of property as a common carrier for compensation on any public highway in this State except in accordance with the provisions of this part.

§ 1064. Fee to accompany application for certificate: Amount: Action of commission on request for certificate

Each application for a certificate of public convenience and necessity made under the provisions of this article shall be accompanied by a fee of five hundred dollars ($500).

Except in the case of cement carriers who seek a certificate on the basis of operations prior to June 1, 1963, and continuously thereafter, as provided in Sec-

tion 1063, the commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by the certificate such terms and conditions as, in its judgment, the public convenience and necessity require. Provided proper application is timely filed, the commission shall issue a certificate to each cement carrier conforming to the proof of good faith operations produced by such cement carrier with respect to its operations prior to June 1, 1963, and continuously thereafter.

§ 1069. Form and contents of application

An applicant shall submit his written verified application to the commission. The application shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the commission requires.

§ 1705. Who may appear at hearing: Witnesses: Making and filing of decision: Contents: Service of order: When order effective: Extension of time to comply with order

At the time fixed for any hearing before the commission or a commissioner, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. The decision

shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own force, take effect and become operative 20 days after the service thereof, except as otherwise provided, and shall continue in force either for a period designated in it or until changed or abrogated by the commission. If the commission believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order.

§ 1706. Record of proceedings

A complete record of all proceedings and testimony before the commission or any commissioner on any formal hearing shall be taken down by a reporter appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review any order or decision of the commission, a transcript of such testimony, together with all exhibits or copies thereof introduced, and of the pleadings, record, and proceedings in the cause, shall constitute the record of the commission, but if the petitioner and the commission stipulate that certain questions alone and a specified portion only of the evidence shall be certified to the Supreme Court for its judgment, such stipulation and the questions

and the evidence therein specified shall constitute the record on review.

§ 1756. Time for application for review to Supreme Court: Return of writ: Certification of record

Within 30 days after the applicatoin for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified.

§ 1757. Introduction of new evidence: Limit of review: Finality of findings and conclusions

No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.

The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such

questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

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7. CALIFORNIA PUBLIC UTILITIES COMMISSION'S RULES OF PRACTICE AND PROCEDURE

5. (Rule 5) *Verification.* Applications or amendments thereto shall be verified by each applicant. Complaints or amendments thereto shall be verified by at least one complainant. Answers shall be verified by at least one of the defendants filing the same. If the party filing the pleading is a corporation or association, the pleading may be verified by an officer thereof.

Verification may be made before a notary public or by certification or declaration under the penalty of perjury.

6. (Rule 6) *Signature and Verification by Attorney.* Except in transfer proceedings (see Rule 35), the attorney for a party may sign and verify a pleading if such party is absent from the county where the attorney has his office, or from some cause is unable to sign and verify such pleading. When a pleading is signed and verified by the attorney, he shall set forth in the affidavit the reasons why the verification is not made by such party.

7. (Rule 7) *Copies.* Unless otherwise required by the Commission, and except as to complaints (see Rule 11), there shall be filed with the Commission an

original and twelve conformed copies of each pleading, or amendment thereof, and the original and twelve copies of each brief or petition for rehearing or petition for leave to intervene.

8. (Rule 8) *Amended Pleadings.* Amendments to pleadings, and amended pleadings, may be filed before hearing, provided they are served upon all known interested parties, filed at least five days before the hearing, and contain a certification of service. Thereafter, pleadings may be amended as permitted, or directed, by the Commission or the presiding officer.

21. (Rule 21) *Common Carrier Certificates.*

Carrier by Vessel, P.U. Code, Secs. 1007–1009
Express Corporation, P.U. Code, Sec. 1010
Freight Forwarder, P.U. Code, Sec. 1010
Passenger Stage Corporation, P.U. Code, Secs. 1031–1036
Highway Common Carrier, P.U. Code, Secs. 1063–1064
Petroleum Irregular Route Carrier, P.U. Code, Secs. 1063-1064, 1067-1069
Cement Carrier, P.U. Code, Secs. 1063-1064, 1067
Passenger Air Carrier, P.U. Code, Secs. 2740–2765

In addition to being drafted to comply with Rules 2 through 8, 15 and 16, applications for certificates under any of the above sections of the Public Utilities Code shall contain the following data, either in the body of the application or in exhibits attached thereto:

(a) The type of service being performed by applicant, a general description thereof, and a reference to the authority under which existing service is performed.

(b) The specific authority requested and the particular statutory provision under which the certificate is requested.

(c) If a carrier of property, a description of specified commodities proposed to be transported, and, if general commodities with exceptions are proposed to be transported, a statement specifying such exceptions.

(d) The geographical scope of the proposed operation, including the termini and other points proposed to be served, and a concise narrative description of the proposed route.

(e) A map or sketch of the route and points to be served, drawn to suitable indicated scale, and showing present and proposed operation by distinctive coloring or marking.

(f) The names of all common carriers with which the proposed service is likely to compete, and a certification that a copy of the application has been served upon or mailed to each such carrier named. Applications shall also name all other parties to whom copies of the application will be mailed. Applicants shall promptly notify the Commission of such mailing. Applicants shall also mail copies to such additional parties and within such times as may be designated by the Commission.

(g) Applications to inaugurate new passenger stage service shall name any state or local authorities located in the area or areas to be served, upon whom service of said application is hereby required to be made, and shall name any other parties to whom copies of the application will be mailed. Applicants shall also mail copies to such additional parties, and within such times as may be designated by the Commission.

(h) A statement of the rates or fares proposed to be charged and rules governing service. Applications for certificates need not contain tariffs, but shall indicate the level and nature of proposed rates and rules and may refer to tariffs on file with or issued by the Commission.

(i) A statement indicating the frequency of the proposed service. If "on call" service is proposed, the application shall set forth conditions under which such service would be performed.

(j) The kind and approximate number of units of equipment to be employed in the proposed service.

(k) A statement of financial ability to render the proposed service.

(*l*) Facts showing that the proposed operation is required by public convenience and necessity.

49. (Rule 49) *Prehearing Conference.* A presiding officer may hold a prehearing conference for the purposes of formulating or simplifying the issues, arranging for the exchange of proposed exhibits or prepared expert testimony, limitation of number of

witnesses, and such other matters as may expedite orderly conduct and disposition of the proceeding.

50. (Rule 50) *Facts Disclosed Privileged.* Facts disclosed in prehearing conferences are privileged. Except by agreement, they shall not be used against participating parties, before the Commission or elsewhere, unless proved by evidence other than that employed in disclosing such facts.

Article 14. Hearings.

51. (Rule 51) *Notice.* In complaint or investigation proceedings, the Commission will give notice of hearing at least ten days before such hearing, unless it be found that public necessity requires hearing at an earlier date. Comparable notice ordinarily will be given when hearings are held in application proceedings.

52. (Rule 52) *Publication of Notice.* In rate increase applications filed by gas, electric, telephone and water utilities, unless specifically exempted or otherwise provided for by the Commission, the applicant, not less than five nor more than thirty days prior to the initial hearing, shall give notice of hearing to entities or persons who may be affected thereby, (1) by posting hearing notice in public places and (2) by publishing notice in a newspaper, or newspapers of general circulation in the area or areas concerned, of the time, date and place of such hearing. If ordered by the assigned Commissioner or Examiner, applicant shall give notice by bill inserts or by mail to the last known billing address of customers on applicant's

records. Proof of such publication and sample copies of the other notices must be filed at or before the hearing.

In other types of applications applicant shall provide such notice to the public as the asigned Commissioner or Examiner may designate for such proceeding. Sample copies of forms of such notices shall be filed at or before the hearing.

Article 15. Subpoenas.

59. (Rule 59) *Requests for Subpoenas.* Requests for the issuance of subpoenas, requiring the attendance of a witness for the purpose of taking oral testimony before the Commission, shall be in writing and may be made by letter or wire.

60. (Rule 60) *Subpoenas Duces Tecum.* Requests for the issuance of subpoenas for the production of documents or records shall be in writing and shall be accompanied by an affidavit specifying the particular document or record, or part thereof, desired to be produced, stating the reasons why the production thereof is believed to be material and relevant to the issues involevd.

61. (Rule 61) *Who May Issue.* Subpoenas may be issued by the Commission, a Commissioner, an Examiner, the Secretary, or an Assistant Secretary. No subpoenas shall issue unless applicant therefor establishes that he has a proper relation to the matter, and gives the name and address of the desired witness. Signed and sealed blank subpoenas will not be issued to anyone. The name and address of the witness

shall be inserted in the original subpoena, a copy of which shall be filed in the proceeding. Subpoenas shall show at whose instance the subpoena is issued.

Article 16. Presiding Officers.

62. (Rule 62) *Designation.* When evidence is to be taken in a proceeding before the Commission, one or more of the Commissioners or an Examiner, may preside at the hearing.

Article 17. Evidence.

64. (Rule 64) *Form and Admissibility.* Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved.

65. (Rule 65) *Rulings.* The presiding officer shall rule on the admissibility of all evidence. Such rulings may be reviewed by the Commission in determining the matter on its merits. In extraordinary circumstances, where prompt decision by the Commission is necessary to promote substantial justice, the presiding officer may refer the matter to the Commission for determination.

66. (Rule 66) *Objections and Exceptions.* When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.

67. (Rule 67) *Offer of Proof.* An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained.

68. (Rule 68) *Prepared Testimony.* With the approval of the presiding officer, a witness may read into the record his testimony on direct examination. Before any prepared testimony is read, unless excused by the presiding officer; the witness shall deliver copies thereof to the presiding officer, the reporter, and all counsel or parties. Admissibility shall be subject to the rules governing oral testimony. If the presiding officer deems that substantial saving in time will result, and where the parties so agree, prepared testimony may be identified and accepted as an exhibit or copied into the record without reading, provided that copies thereof shall have been served upon all parties and the Commission ten days before the hearing or such prior service is waived.

69. (Rule 69) *Documentary Evidence.* If relevant and material matter offered in evidence is embraced in a document containing other matter, the party offering it shall designate specifically the matter so offered. If other matter in the document would unnecessarily encumber the record, the document will not be received in evidence, but at the discretion of the presiding officer, the relevant and material matter may be read into the record or copies thereof received as an exhibit. Other parties shall be afforded opportunity to examine the document, and to offer in evidence other portions thereof believed material and relevant.

70. (Rule 70) *Exhibits.* Exhibits shall be legible and either prepared on paper not exceeding 8½ x 13 inches in size, or bound or folded to that approxi-

mate size. Wherever practicable, the sheets of each exhibit should be numbered, and rate comparisons and other figures shall be set forth in tabular form. Copies of exhibits must be clear and permanently legible.

71. (Rule 71) *Copies.* When exhibits are offered in evidence, the original shall be furnished to the presiding officer and a copy to the reporter and to each party, unless the presiding officer directs otherwise.

72. (Rule 72) *Commission Records.* If any matter contained in a document on file as a public record with the Commission is offered in evidence, unless directed otherwise by the presiding officer, such document need not be produced as an exhibit, but may be received in evidence by reference, provided that the particular portions of such document are specifically identified and are competent, relevant and material. If testimony in proceedings other than the one being heard is offered in evidence, a copy thereof shall be presented as an exhibit, unless otherwise ordered by the presiding officer.

73. (Rule 73) *Official Notice of Facts.* Official notice may be taken of such matters as may be judicially noticed by the courts of the State of California.

74. (Rule 74) *Additional Evidence.* At the hearing, the presiding officer may require the production of further evidence upon any issue. Upon agreement of the parties, he may authorize the filing of specific documentary evidence as a part of the record within a fixed time after submission, reserving exhibits numbers therefor.

Article 19. Decisions and Proposed Reports.

77. (Rule 77) *Issuance of Decisions.* A proceeding shall stand submitted for decision by the Commission after the taking of evidence, and the filing of such briefs or the presentation of such oral argument as may have been prescribed by the Commission or the presiding officer.

78. (Rule 78) *Petition for Proposed Report.* A party to a proceeding may file a petition requesting that a proposed report be issued by the presiding officer. Such petition shall be filed and called to the attention of the presiding officer before the conclusion of the hearing. The original and twelve copies of the petition shall be filed with the Commission, and the original shall show that copies have been served upon all parties to the proceeding. The petition shall set forth the reasons why it is believed that issuance of such a proposed report will promote the administration of justice and will not cause unreasonable delay in the final determination of the proceeding. Objections may be served an filed by other parties within five days after service of the petition.

79. (Rule 79) *Proposed Reports.* Upon direction by the Commission, the presiding officer shall prepare and file his proposed report. The Secretary's office shall cause copies thereof to be served upon all parties to the proceeding. Such proposed report shall contain recommended findings, conclusions, and order.

80. (Rule 80) *Exceptions.* A party may serve and file exceptions to a proposed report within twenty days after service thereof. Exceptions shall be specific,

and stated and numbered separately. Exceptions to factual findings shall specify the portions of the record relied upon; proposed substitute findings; and proposed additional findings, with supporting reasons. Exceptions to conclusions shall cite statutory provisions or principal authorities relied upon; proposed substitute conclusions; and proposed additional conclusions.

81. (Rule 81) *Replies to Exceptions.* Replies may be served and filed within fifteen days after service of exceptions.

82. (Rule 82) *Service of Orders.* Decisions and orders shall be served by the Secretary's office by mailing copies thereof to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a copy thereof. When a party to an application proceeding has appeared by a representative, service upon such representative shall be deemed to be service upon the party.

83. (Rule 83) *Effective Date.* Decisions and orders in complaint or investigation proceedings shall become effective twenty days after service thereof, unless otherwise provided therein. Decisions and orders in other proceedings shall become effective twenty days after issuance thereof, unless otherwise provided therein.

Article 20. Reopening Proceedings.

84. (Rule 84) *Petition to Set Aside Submission.* After conclusion of hearings, but before issuance of a decision, a party to the proceeding may serve on all other parties, and file with the Commission, a petition to set aside submission and reopen the proceeding for the taking of additional evidence. Such petition shall specify the facts claimed to constitute grounds in justification thereof, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. It shall contain a brief statement of proposed additional evidence, and explain why such evidence was not previously adduced.

Article 21. Rehearings.

85. (Rule 85) *Petitions for Rehearing.* Petitions for rehearing of an order or a decision shall be served upon all parties and should be filed before the effective date thereof, or, if the Commission has fixed a date earlier than the 10th day after issuance as the effective date of the order or decision, then before the 10th day after the date of issuance. (See P.U. Code, Sec. 1731.) Petitions shall set forth specifically the grounds on which petitioner considers the order to be unlawful or erroneous.

86. (Rule 86) *Effect of Filing.* Mere filing of a petition for rehearing shall not excuse compliance with a decision. A petition filed ten or more days before but not granted or denied before the effective date of an order suspends the order until the petition is granted or denied. (See P.U. Code, Sec. 1733.)